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THE INDIAN LAW REPORTS,

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT.

REPORTED BY

Privy Council
High Court

... N. H. THOMSON, *Faculty of Advocates in Scotland.*
... G. T. SPANKIE, *Lincoln's Inn.*

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APPELLATE CIVIL.

1880
January 15.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

BASANT LAL AND ANOTHER (PLAINTIFFS) v. TAPESHRI RAI (DEFENDANT)*

Registration—Act VIII. of 1871 (Registration Act), ss. 17, 18.

N agreed by an instrument in writing called a "*sattah*," in consideration of a loan of Rs. 99-8-0, that *B* should have the right of cultivating indigo on certain land from a certain date for a certain period; that if she failed to make over to him any portion of such land, or interfered with his cultivation of any portion of it, she should be responsible in damages for the loss occasioned to *B* in respect of such default or interference at the rate of Rs. 40 per bigha, and for the repayment of such loan; "that, if she failed to pay, *B* was at liberty to recover from her person and property; and that, until the conditions of the agreement were fulfilled, she hypothecated her four-anna share in mauza *B*." *B* sued *N* upon the "*sattah*" to recover Rs. 1,059-6-0, being the amount of such loan and damages, by the sale of such four-anna share, such suit being founded on a breach of the agreement. *Held per* STUART, C. J., that, inasmuch as the value relating to the immoveable property hypothecated in the "*sattah*" was simply Rs. 99-8-0, without any stipulation as to interest or any other payment by which that sum might be augmented, the damages stipulated for depending upon a contingency which might or might not happen, and respecting which nothing could be anticipated at the time of registration, the instrument did not, under Act VIII. of 1871, s. 17, require registration. *Darshan Singh v. Hanwanta* (1) observed on.

Per OLDFIELD, J.—That, the only certain sum secured by the "*sattah*" being Rs. 99-8-0, the instrument did not require registration under that Act, but it could not be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

* Second Appeal, No. 474 of 1879, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 16th January, 1879, modifying a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 14th September, 1878,

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THE plaintiffs in this suit claimed to recover from the defendants, Najib-un-nissa Bibi and Muhammad Ahia, Rs. 1,059-6-0, being moneys advanced to those defendants, and damages, in virtue of an instrument executed by those defendants in the favor of the plaintiffs called a "*sattah*." The plaintiffs claimed to recover such moneys from those defendants personally, and by the sale of a four-anna share in a village called Bhurra Makbulpur, belonging to those defendants, which was alleged to be hypothecated in the "*sattah*" as security for the payment of such moneys. The plaintiffs also claimed that certain alienations by sale of such share made subsequently to the date of the "*sattah*," one of such alienations having been made to the defendant Tapesbri Rai, might be "cancelled." The terms of the "*sattah*" will be found fully stated in the judgments of the High Court. The defendant Tapesbri Rai set up as a defence to the suit, *inter alia*, that the "*sattah*" required to be registered, and being unregistered could not affect the four-anna share in Bhurra Makbulpur or be received as evidence of its hypothecation to the plaintiffs. The Court of first instance held that the "*sattah*" did not require registration; and eventually gave the plaintiffs a decree for the sum claimed against Najib-un-nissa Bibi and Muhammad Ahia, directing that the money might be realized by the sale of the four-anna share in Bhurra Makbulpur. On appeal by the defendant Tapesbri Rai the lower appellate Court held that the "*sattah*" required to be registered, and not being registered could not affect the four-anna share or be received as evidence of its hypothecation to the plaintiff, and modified the decree of the Court of first instance, in so far as it directed the sale of the share. The plaintiffs appealed to the High Court.

Mr. Spankie (with him Babu Oprokash Chandar Mukarji), for the appellants, contended that the "*sattah*" did not require registration, as it did not certainly secure Rs. 100. He referred to *Ahmad Bakhsh v. Gobindi* (1); *Karan Singh v. Ram Lal* (2); *Rajpati Singh v. Ram Sukhi Kuar* (3); and *Darshan Singh v. Hanwanta* (4).

Mr. Conlan, Munshi Hanuman Prasad, and Mir Akbar Husain, for the respondent.

(1) I. L. R., 2 All., 216.

(2) I. L. R., 2 All., 96.

(3) I. L. R., 2 All., 40.

(4) I. L. R., 1 All., 274.

The following judgments were delivered by the Court :

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STUART, C. J.—The two principal questions raised in this appeal are (i) what is the nature of the instrument on which the plaintiffs sue to recover? and (ii) does it require registration in order to be received in evidence and enforced against the property mentioned in it?

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The instrument is as follows:—I, Najib-un-nissa Bibi, &c., do hereby declare that I, the executant, being in need of meeting my own necessity, have, on a promise to give land for sowing indigo in 1284 fasli, borrowed Rs. 99-8-0, as a *zar-i-peshgi* advance, from Babu Basant Lal and Babu Ganga Prasad Singh, proprietors of the godown at Bisauli in pargana Nizamabad: that I promise and write that I shall get first class sugar-cane and barley producing 24 bighas of land in mauza Bhurra Makbulpur, pargana Nizamabad, as selected by the karindas of the said godown, measured by the large chain consisting of three Ilahi yards, *i. e.*, 20 biswas, according to Mr. Duncan's pole or *latha* as used at the said godown, at the end of the month of Chait 1283 fasli: that the said agents of the godown are to irrigate the land mentioned above from pucka and kucha wells, canal, lake, and ponds, in any way they think proper, and raise indigo: that they are to lay out their own money for the purpose of beating up the indigo leaves, at the time of beating up: that after setting off the rent of the said land at Rs. 4 per bigha together with the patwari's charges against the *zar-i-peshgi*, both principal and interest, whatever surplus will be found due to me I shall recover from the proprietors of the said godown: that the proprietors of the said godown are to relinquish the land sown with indigo at the end of Bhadon, 1284 fasli, after cutting the indigo stumps: that we shall then settle the land used for planting indigo with any tenant we like: that if we (God forbid) fail to give the whole land, or interfere with the sowing of indigo seed or irrigation thereof, or should any one else interfere or turn up the indigo (seed), the proprietors of the godown shall have the power to recover damages for loss, according to the practice of the godown, at Rs. 40 per bigha (regarding the deficiency in the quantity of land or on account of the land in respect of which over turning or ejection may take place or irriga-

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tion be interrupted) together with the principal *zar-i-peshgi* amount, from me, the executant : that if I fail to pay, the proprietors of the godown are at liberty to recover from my person and property : that until the fulfilment of the conditions of the agreement we hypothecate our four-anna right and property in mauza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void."

I am clearly of opinion that this instrument is not a mere lease but an instrument in the nature of a usufructuary mortgage. For let us observe its terms. On the recital that Najib-un-nissa Bibi, the party making it, for herself and her minor sons and daughters, was "in need of meeting my own necessity," it stipulates that she shall receive a *zar-i-peshgi* advance of Rs. 99-8-0 from the parties in whose favor the instrument is granted, and in consideration of that advance she promises to lease to the plaintiffs 24 bighas of land at a rent of Rs. 4 per bigha for a period commencing from Chait 1283 to Bhadon 1284 (*i.e.*, for about 17 months), the land to be selected by the defendant ; and it goes on to provide "that the proprietors of the godown are to relinquish the land sown with indigo crop at the end of Bhadon 1284 fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like," and that should she fail in performance of her part of the contract she should pay damages at the rate of Rs. 40 per bigha together with the *zar-i-peshgi* advance, and if she should fail to pay these damages and the advance, the parties with whom she contracts should be at liberty to recover from her person and property ; and it then expressly provides "that until the fulfilment of the conditions of the agreement, we hypothecate our four-anna right and property in mauza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void." Such an instrument is, in my opinion, essentially a usufructuary mortgage, and I observe that Mr. Macpherson in his work on the Law of Mortgages in Bengal and the North-Western Provinces, 5th ed. p. 8, so describes it. He there says : "*Zar-i-peshgi* leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such ;" and in support of this opinion he refers to numerous

authorities; and the learned author adds: "but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly." In the present case we have not only an express hypothecation and for a distinct term, but the power to redeem is clearly implied, not only from that term itself, but from the proviso "that the proprietors of the godown are to relinquish the land together with indigo crop at the end of Bhadon 1284 fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like."

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Being then an instrument of this nature the next question is, whether it requires registration in order to be put in force against the property hypothecated by it? I am clearly of opinion that it does not require registration. The registration law to be considered in such a case is that provided by Act VIII. of 1871, and the document in the present case clearly falls within the instruments mentioned in sub-section 1 of s. 18 of that Act as an instrument of value less than Rs. 100 in respect of immoveable property. It was suggested at the hearing that the question of the registration of such an instrument as this came within the principle of several rulings of this Court by which it appears to have been held that, in estimating the value to be considered in such cases, the interest agreed to be paid should be taken into account, and a judgment of my own, sitting with Turner, J., was referred to as showing this.—*Darshan Singh v. Hanwanta* (1). In that case the bond which was unregistered was for a sum of Rs. 99 together with interest at 2 per cent. per mensem, and for that debt the defendants hypothecated certain property. In our judgment, which was delivered by Turner, J., and concurred in by me, it is stated that the bond "secured the repayment of Rs. 99 *plus* Rs. 6 the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered, we cannot act upon it." I have again looked at the bond in that case, and I observe it stipulates for the repayment of the Rs. 99 with interest thereon at the rate of two per cent, "payment to be made in Sambat 1928." It would appear to have been considered by us that this absolutely and beyond the control

(1) I. L. R., 1 All., 274.

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of the parties postponed payment till that date, and if so undoubtedly the amount was over Rs. 100 and the bond required registration, and our judgment does not fall within the rulings of this Court to which I have referred. It may possibly be that we were mistaken in reading the bond as we did, and that the condition as to payment in Jaith, Sambat 1928, was introduced merely for the convenience of the lender of the money who might then demand it, but possibly there was nothing to prevent the borrower paying up the Rs. 99, if he had the money, almost immediately or very soon after the execution of the bond, so as to make the debt less than Rs. 100, and that would have been the true value for the purposes of registration. But I suppose all that was considered at the time of our judgment, and that we were well advised as to the facts when we stated that Rs. 99 *plus* Rs. 6 for interest "was the least sum that could have been recovered under the instrument." But if it were otherwise and the bond simply acknowledged a debt of Rs. 99 which could have been repaid with interest, no matter how soon, then I am inclined to think our judgment was wrong and that the only certain criterion of value for registration is the principal sum. In the present case our attention was directed to rulings of certain of the other High Courts laying down this principle, and particularly one by the High Court of Bombay (1), where it was decided that for the purpose of registration the principal sum alone was to be looked at. It appears unnecessary to consider such conflicting rulings in the present case, although I may remark that I have received a very strong impression that the Bombay Court are right and our course of decision to the contrary has been mistaken, and so soon as the question is again raised here I hope it may be referred to the Full Bench for serious and deliberate consideration. In the present case, however, we need not occupy ourselves with any such discussion, as the value relating to the immoveable property is simply Rs. 99-8-0 without any stipulation as to interest or any other payment by which the principal sum may be augmented; the damages stipulated for depending on a contingency which may or may not happen and respecting which nothing can be anticipated at the time of registration. The decree of the lower appellate Court must therefore be modified so as to

(1) *Nanabin Lakshman v. Anant Babaji*, L. L. R., 2 Bom., 353.

allow the plaintiff to recover the Rs. 99-8-0 from the hypothecated property, the decree of the lower appellate Court in other respects remaining good.

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OLDFIELD, J.—It appears that Najib-un-nissa Bibi for self and as guardian of her minor children executed a deed called a "*sattah*," dated 15th March, 1876, in favor of the plaintiffs, by which she covenanted to lease to them certain lands, and she at the same time hypothecated to them by the said "*sattah*" a four-anna share in mauza Bhurra Makbulpur for the repayment of a sum of Rs. 99-8-0, advanced to her as a loan, and for damages payable by her in the event of her failure to fulfil the conditions of the contract. A $5\frac{1}{2}$ annas share including the hypothecated four annas share was subsequently sold by one of the sons to Tapesbri Rai and Mahesh Rai and Ram Lal, the two latter being represented in this suit by Kunjan Singh. Tapesbri Rai bought $3\frac{1}{2}$ annas and obtained a mortgage on the remaining 2 annas share and the others bought a 2 annas share. The plaintiffs now bring this suit against the vendors, purchasers, and mortgagee, to recover Rs. 1,059-6-0 by sale of the hypothecated four annas share, the sum they claim being the sum they advanced and the damages to which the vendors became liable for failure to fulfil the terms of the *sattah*, and for which amount the share was hypothecated, and they base their claim on the *sattah*. The plaintiffs and executants of the *sattah* entered into a compromise; Kunjan Singh defendant-purchaser confessed judgment; and Tapesbri Rai, who it will be seen is interested in the whole four annas share hypothecated in the *sattah*, as out of $5\frac{1}{2}$ annas which belonged to the executants he purchased $3\frac{1}{2}$ and holds a mortgage on the remaining 2 annas, disputed the claim on the ground, *inter alia*, that the claim to enforce the hypothecation of four annas under the *sattah* necessarily failed, inasmuch as that instrument should have been registered, as it created a lien over the property for more than Rs. 100, and being unregistered was inadmissible in evidence. The first Court decreed the claim, exempting two of the children of Najib-un-nissa. Tapesbri Rai appealed to the Judge and raised the same objection as to the registration, and the Judge held that the objection was valid, and he set aside so much of the

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decree as enforced the hypothecation under the *sattah* against the property.

The plaintiffs have preferred a second appeal making Tapesbri Rai alone respondent, and they urge that the instrument does not require registration as it does not create any interest in immoveable property of the value of Rs. 100 and upwards, and further that the Judge could not modify the decree in respect of defendants who did not appeal ; and there is an objection as to costs.

Looking at the instrument in question, which is called a "*sattah*," I find that by its first clauses the executant declares that she has taken a loan of Rs. 99-8-0 from plaintiffs on the promise that she shall lease the land for farming indigo for the season of 1284 fasli, and she covenants to have measured, and to put plaintiffs in possession, in Chait 1283 fasli, of 24 bighas of land to be selected by the plaintiffs' agent, to be held by them on lease from Chait 1283 to Bhadon 1284 at a rent of Rs. 4 per bigha, and it is stipulated she shall receive the surplus rent after deducting the amount of the loan with interest.

The executant binds herself to pay the plaintiffs damages at a certain sum per bigha for loss sustained by failure on her part to fulfil the conditions of the agreement, and she hypothecates a four anna share in mauza Bhurra Makbulpur as security for the repayment of the sum advanced and the damages she may become liable for.

I am unable to put quite the same construction on this document that the Chief Justice does. The first portion of the instrument appears to me to be a simple lease or agreement to lease and not to be a "*zar-i-peshgi*" lease, or lease granted on a sum of money being advanced of the nature of a usufructuary mortgage. It is true that such leases often are on the same footing as pure usufructuary mortgages, but it will be seen from Macpherson on Mortgages, 5th ed. p. 9, that "this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage."

I find no such indication here. The land was leased for a fixed period at the end of which the lease terminated : provision was made for the recovery of the whole advance out of the rent payable to the lessor by the lessee and the land was in no way mortgaged as security for the repayment of the sum advanced. I am not called on, looking to the pleadings, to say whether this instrument should have been registered as a lease.

The last portion of the instrument, however, undoubtedly effects an hypothecation of a four annas share of the mauza, and the only question which is raised in this appeal for our decision under the Registration Law is whether this portion of the instrument creates a mortgage to the value of Rs. 100 and registration was in consequence compulsory under s. 17 of the Act of 1871. I think not : for the only certain sum secured by the hypothecation is Rs. 99-8-0, and the instrument cannot be held in the terms of the law to purport or operate to create any right, title, or interest of greater value than that sum.

The particular objection taken to the inadmissibility of the instrument in evidence with which we have to deal fails, and so far the first ground of appeal is valid, but the instrument cannot be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

Before Mr. Justice Pearson and Mr. Justice Straight.

KHATUN BIBI (PLAINTIFF) v. ABDULLAH (DEFENDANT).*

Principal and Surety—Discharge of Surety by variance in terms of Contract—Act IX. of 1872 (Contract Act), s. 133.

A *kabuliyat* whereby a lessee agrees, without the consent of the person guaranteeing the payment of the rent agreed to be paid under a former *kabuliyat*, that he will pay rent at a higher rate than that agreed to be paid in such former *kabuliyat*, amounts to a variance of the terms of the contract of guarantee and discharges the lessee's surety in respect of arrears of rent accruing subsequent to such variance.

* Second Appeal, No. 1321 of 1879, from a decree of Maulvi Mahimud Bakhsh, Additional Subordinate Judge of Ghāzipur, dated the 8th September, 1879, reversing a decree of Munshi Kulwant Prasad, Munsif of Kasra, dated the 13th May, 1879.

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June 1.

1880

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v.
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On the 9th March, 1872, one Abdul Qayum, to whom a lease of certain zemindari estates for a term of seven and a half years had been granted by the proprietors of such estates in consideration of an annual payment of Rs. 390, executed a *kabuliyat* or counterpart of the lease in favor of the lessors. In this instrument he covenanted, *inter alia*, to pay the lessors Rs. 390 annually in four equal instalments. On the same date, that is to say, on the 9th March, 1872, one Tafazzul, as the lessee's surety, executed a bond in favor of the lessors in which he hypothecated his two-anna eight-pie share in a village called Chahubandh as collateral security for the due payment of the lessee's rent. On the 29th May, 1872, without the consent of his surety, the lessee gave the lessors a second *kabuliyat*. This instrument, after referring to the execution of the lease and the *kabuliyat* of the 9th March, 1872, declared as follows: "But owing to the absence of the collection-papers relating to the aforesaid villages, a small amount was fixed as the profits of the lessors, and only Rs. 390 were entered in the *kabuliyat* as the profits of the lessors: according to the *tahsil* papers of the above villages, however, Rs. 450 should be fixed and paid as the profits of the lessees after deducting the revenue, the village-expenses, patwāris' fees, and the lessee's collection-fees: of this amount Rs. 390 have already been entered in the *kabuliyat*: for the purpose of paying the balance of such profits, Rs. 60, I declare, by maintaining all the conditions of the *kabuliyat* referred to, and hereby agree, that the Rs. 60 in question shall be paid in four instalments." The instrument then provided that these instalments should be paid together with the four instalments payable under the *kabuliyat* of the 9th March, 1872. On the 20th December, 1874, Tafazzul executed a deed of sale of his two-anna eight-pie share in the village of Chahubandh in favor of his wife Khatun Bibi, the plaintiff in the present suit, in consideration of a dower-debt. On the 14th May, 1877, the lessors obtained an *ex parte* decree against the lessee and his surety Tafazzul for arrears of rent which became due in 1873, which decree gave the lessors a lien on the surety's share in Chahubandh for its amount. This decree was subsequently purchased by the defendant in the present suit, Abdullah, who caused Tafazzul's two-anna eight pie share in the village of Chahubandh to be attached and pro-

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claimed for sale in the execution of it. Thereupon the present suit was instituted by the plaintiff, Khatun Bibi, in which she claimed in virtue of the deed of sale dated the 20th December, 1874, and her possession thereunder, a declaration of her proprietary right to the property, "by releasing it from attachment and protecting it from auction-sale," and the cancellation of the decree dated the 14th May, 1877. The contentions of the parties to the suit gave rise to the question whether or not, regard being had to s. 133 of the Contract Act of 1872, the terms of the contract between the lessors and the lessee contained in the *kabuliyat* of the 9th March, 1872, had been varied by the terms of the subsequent *kabuliyat* of the 29th May, 1872, and thereby the surety was discharged, and the decree of the 14th May, 1877, was invalid as against the plaintiff, who was no party thereto. Upon this question the Court of first instance held that the terms of the contract contained in the first *kabuliyat* had been varied by those of the contract contained in the second *kabuliyat*, and Tafazzul was thereby discharged from his suretyship, and the plaintiff, being no party to the suit in which the decree of the 14th May, 1877, was made, was not affected by that decree; and in the event gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held on the question above-stated that Tafazzul was not discharged from his suretyship, and the plaintiff was bound by the decree made against him.

The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Lal Chand*, for the appellant.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J. — We think that the first plea in appeal should prevail and that the judgment of the first Court should be restored. The *kabuliyat* of the 29th May, 1872, is practically an addition to that of the 9th March, and under it the amount of profits to be paid by the lessee is increased by Rs. 60 a year. It might well be that the surety would be willing to guarantee payment of Rs. 390, but unwilling to stand security for a larger sum, and it is admitted

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that his consent was neither asked nor given to the second agreement. The failure of the lessee to pay his rent was subsequent to the 29th May, and his defaults, in respect of which the suretyship was enforced, were all made after that date. S. 133 of the Contract Act therefore applies, and there having been a variance in the terms of the contract between the lessor and the lessee without the surety's consent, he was discharged. We think that the plaintiff appellant is not debarred from taking advantage of this objection to bring a suit for the relief she now seeks. The appeal will therefore be decreed with costs.

Appeal allowed.

1880
 June 7.

Before Mr. Justice Fearson and Mr. Justice Oldfield.

AHMAD-UD-DIN KHAN (PLAINTIFF) v. MAJLIS RAI AND OTHERS
 (DEFENDANTS).*

Attachment of Property—Debt—Vendor and Purchaser—Act X. of 1877 (Civil Procedure Code), ss. 266, 268.

The right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as the conveyance has not been executed, a debt, but a merely possible right or interest, and as such, under s. 266 of Act X. of 1877, is not liable to attachment and sale in the execution of a decree. The person who purchases such a right or interest at a sale in the execution of a decree takes nothing by his purchase.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu *Oprokash Chundar Mukurji*, for the appellant.

Babus *Joyindro Nath Chaudhri* and *Ratan Chand*, for the respondents.

The following judgment was delivered by the Court :

OLDFIELD, J. (PEARSON, J., concurring).—The facts are these:—Defendants claimed certain property which was also claimed by one Rahso, and had been sold by her to Umrao Begam. Defendants then sold one half of their interest to Aftab Begam, wife of plaintiff, and she joined them in a suit against Rahso and Umrao Begam to recover the property. The Court of first instance dis-

* First Appeal, No. 100 of 1879, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 26th June, 1879.

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MAJLIS RAL

missed the claim, but an appeal was instituted to the High Court, and while it was pending defendants entered into an agreement with Aftab Begam, dated the 26th March, 1876, by which they sold to her their remaining interest in the properties, together with any costs and mesne profits they might become entitled to under the decree they might obtain in the High Court, and a plot of five yards of land; and agreed to execute a deed of sale for the same on the passing of the decree of the High Court in their favour, the consideration being Rs. 3,000, of which Rs. 800 were to be paid at once in cash, and Rs. 2,200 at the time of execution of the deed of sale. The High Court passed a decree in favour of Aftab Begam and defendants on the 16th August, 1876, and possession was given on the property, and the plaintiff in this suit, who is Aftab Begam's husband and represents her now, seeks to have specific performance of the sale-contract dated 26th March, 1876; also to recover money paid for revenue and mesne profits. Plaintiff, however, refuses to pay the balance of the consideration-money, Rs. 2,200, to defendants on the ground that one Ismail Khan (who is his brother) had the defendants' interest in this sum attached and sold at auction in execution of his decree against the defendants and became the purchaser, and plaintiff avers he has had to pay the money to Ismail Khan.

The material answer on the part of defendants is (i) that the sale-contract is void by reason of undue advantage having been taken of defendants' necessities; (ii) that Aftab Begam had never fulfilled her part by payment of Rs. 800; (iii) that the plaintiff cannot escape from the obligation to pay the balance, Rs. 2,200, without which payment he is not entitled to the relief he seeks in the suit, and that the proceedings in the execution of the decree and sale were in fraud of defendants; that plaintiff and not Ismail Khan was the real owner of the decree, and the real purchaser, and there had been no payment of Rs. 2,200 to Ismail Khan; (iv) there was no valid right for the sums claimed. The lower Court has held that there is no valid ground for setting aside the sale-contract, and that Aftab Begam did pay Rs. 800 under its terms; but the Subordinate Judge has gone on to hold that plaintiff cannot succeed in this suit as he is bound to pay Rs. 2,200.

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He holds that the sale of the debt or claim in respect of this sum in execution of the decree was illegal, and that, as a matter of fact, plaintiff never paid any of it to the ostensible purchaser who was his brother; and he dismissed the suit. Plaintiff has appealed, and defendants have filed objections in regard to the finding as to the validity of the sale-contract and payment of Rs. 800 and costs. These objections, however, are not entertainable since they were filed beyond the time allowed by law. There is, however, no reason to doubt the correctness of the finding as to the validity of the sale and payment of Rs. 800.

The appeal, however, cannot in my opinion succeed. The sale of the interest in the sum of Rs. 2,200 was illegal and cannot defeat defendants' right to receive that sum as a consideration for their fulfilling the sale-contract dated 26th March, 1876. An examination of the execution-proceedings shows that the attachment and sale in execution of Ismail Khan's decree was of the sum of Rs. 2,200 as a debt due to the defendants, the judgment-debtors; and under s. 268 the defendants were directed not to recover the sum from the plaintiff until the further order of the Court, and the plaintiff was directed to deposit the sum in Court, see exhibits 64A, 36A, and 26. Now this sum at the time of attachment and sale was not a debt due to defendants (judgment-debtors); the obligation on the part of plaintiff to pay it to defendants could only arise when defendants conveyed the property to him. As a purchaser of a debt due to the judgment-debtor, Ismail Khan took nothing by his purchase. But if it be held that what was intended to be attached and sold was the future interest in the sum of Rs. 2,200 which the judgment-debtors might eventually obtain (and for my part I cannot consider that such was the intention), then I hold that such an interest was not liable to attachment and sale under s. 266, Civil Procedure Code, since the interest was merely a possible right or interest,—a claim which defendants (the judgment-debtors) might possibly obtain against plaintiff, if the latter succeeded in establishing a sale-contract which the judgment-debtors repudiated, and when the judgment-debtors conveyed the property to plaintiff under the sale. At the time of sale the sum represented no existing debt or any interest in which the

judgment-debtors admitted themselves to be beneficially interested, or to have a right of disposal over. It is obvious that, if a sale of such a possible right or interest were to be allowed, a judgment-debtor would be seriously affected, for an interest would be sold which at the time is speculative, and which would fetch little or nothing, but which might at a future day become valuable to the judgment-debtor. This is what happened in this case, the interest in Rs. 2,200 having been sold for Rs. 160.

I must also add that the circumstances connected with the execution-proceedings are not free from suspicion of unfair dealing towards defendants in putting up to sale an unsaleable interest, considering all the facts and the relationship between plaintiff and Ismail Khan, the auction-purchaser; and I am not satisfied that plaintiff has paid the sum of Rs. 2,200 to Ismail Khan or that there was any intention that it should be paid. The evidence is not satisfactory on the point of payment, as the Subordinate Judge observes, and it is unlikely that plaintiff would pay away the money to any one until he had succeeded in getting the property conveyed to him; for, until then, there was no obligation on him to pay it. Moreover, he had been called on by the Court that ordered the attachment and sale to deposit the sum in court, but he does not appear to have done so, and had the proceedings at the sale been *bond fide*, it would have been expected that, instead of paying the money to Ismail Khan as he alleges, he would have complied with the order, and have deposited the money under protest, asking that its payment to Ismail Khan should await the completion of the sale-contract in his favour, until when it could not be demanded from him. I would dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Straight.

JAI-LAX DAS AND ANOTHER (DEFENDANTS) v. BENI PRASAD (PLAINTIFF) *

Sale in execution of decree—Pre-emption—Act X. of 1877 (Civil Procedure Code), s. 310.

The provisions of s. 310 of Act X. of 1877 are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights and interests of a mortgagee in such a share.

* Second Appeal, No. 331 of 1880, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 12th January, 1880, affirming a decree of Maulvi Muhammad Wajih-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 22nd July, 1879.

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DIN KHAN
v.
MAJLIS RAI.

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July 9.

• 1880

JAIRAM DAS
v.
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THIS was a suit to establish the plaintiff's right of pre-emption in respect of the rights and interests of a mortgagee in a seven-pie share of an undivided estate, and for possession of such share, the claim being based upon the provisions of s. 310 of Act X. of 1877. Such rights and interests were put up for sale in the execution of a decree against the mortgagee on the 21st January, 1878. The property was knocked down to the defendants, and as soon as this happened the plaintiffs preferred a claim to the right of pre-emption before the officer conducting the sale, and at the same time deposited the purchase-money, Rs. 160. The Court executing the decree having disallowed the claim, the plaintiffs instituted the present suit. The defendants stated in defence of the suit, *inter alia*, as follows: "The plaintiffs did not bid at the time of the auction sale as provided for in s. 310 of Act X. of 1877, and the sale was concluded in the favor of the defendants at their last bid: the Court executing the decree has held that the pre-emptors did not carry out the provisions of s. 310, which could confer on them the right to pre-emption, and therefore a suit for a thing already settled in the execution-department will not lie: the plaintiffs having failed to carry out the provisions of s. 310, have lost their right of pre-emption." The Court of first instance gave the plaintiffs a decree, holding that they had advanced at the bidding at the sale the same sum as the defendants, but the officer conducting the sale had refused to accept two equal bids. On appeal by the defendants, they again contended, with reference to s. 310 of Act X. of 1877, that the plaintiffs were bound, before the property was knocked down at the sale, to advance the same bid as the defendants, and that their doing so immediately after the fall of the hammer was not sufficient to secure the right of pre-emption. The lower appellate Court held, finding apparently that the plaintiffs had not bid at the sale, that, for the purposes of s. 310 of Act X. of 1877, it was sufficient for a co-sharer to claim immediately his right of pre-emption at the sum at which the property has been knocked down, and that it was not necessary that he should bid at the sale the same sum as the stranger; and affirmed the decree of the Court of first instance.

On second appeal to the High Court the defendants raised in their grounds of appeal the same contention as they had raised in

the lower Courts. The plaintiff-respondent objected, under s. 561 of Act X of 1877, that the finding of the lower appellate Court that the plaintiffs had not bid at the sale was directly opposed to the evidence on the record of the case.

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Lala Lalia Prasad, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—In disposing on the 2nd April last of Second Appeal No. 1142 of 1879 (1), we have expressed our opinion as to the proper construction of the particular terms of s. 310, Act X of 1877, in regard to which a question is raised in the present case. But the question appears to us to be irrelevant in the present case, because in reference to other terms of the same section we are compelled to hold that the plaintiff has no right of pre-emption to the property claimed by him. That property is not a share of undivided immoveable property, but the rights and interests of a mortgagee in a share. S. 310 says that, “when the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons, one of whom is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.” But the rights and interests of a mortgagee in a share are not the same thing as a share : and the provisions of the section are inapplicable in the present case. The suit must fail ; and we are relieved of the necessity of dealing with the pleas in appeal and the objection taken by the respondent. We reverse the decree of the lower Courts, but having regard to the circumstances direct that the parties each bear their own costs in all the Courts.

Appeal allowed.

(1) *Tej Singh v. Gobind Singh*, I. L. B., 2 All., 850.

1880
June 11.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

**THE COLLECTOR OF BIJNOR, MANAGER OF THE ESTATE OF CHAUDHRI
RANJIT SINGH, A MINOR, (DEFENDANT) v. JAFAR ALI KHAN (PLAINTIFF)***

Order of remand—Appeal—Suit of the nature cognisable in Small Cause Court—Second appeal—Act X of 1877 (Civil Procedure Code), ss. 584, 586, 588 (28), 589.

An order on appeal from a decree in an original suit of the nature cognisable in Mufassal Courts of Small Causes, under s. 582 of Act X of 1877, remanding the suit for re-trial is appealable, s. 586 of Act X of 1877 notwithstanding, as that section applies to appeals from appellate decrees and not to appeals from orders.

THE plaintiffs in this suit claimed "to recover Rs. 69, damages for nine cows and one calf, which the defendant caused to be attached and sold by auction on the 25th April, 1878, as the property of Muzaffar Khan, his judgment-debtor; also to recover Rs. 46-14-4 damages and costs charged against the plaintiffs in the Revenue Court; entire amount of claim Rs. 115-14-4; by cancelment of the miscellaneous orders of the Revenue Court dated the 18th and 27th March, 1878." It appeared that the defendant had caused the cattle which the plaintiff claimed as his property to be attached in the execution of the decree of a Revenue Court held by him against Muzaffar Khan. The plaintiff objected to the attachment, but his objections were disallowed by the Revenue Court; and the cattle were sold on the 25th April, 1878. The Court of first instance dismissed the suit on a preliminary point which it is not material to notice. On appeal by the plaintiffs the lower appellate Court reversed the decree of the Court of first instance on such point, and remanded the case for re-trial, under s. 562 of Act X of 1877. On appeal by the defendant to the High Court, it was objected by the plaintiff-respondent that the suit was of the nature cognisable in a Court of Small Causes and consequently no second appeal in the case would lie. The Division Bench (PEARSON, J., and OLDFIELD, J.,) before which the appeal came, on the 26th April, 1880, referred to the Full Bench the question "whether

* First Appeal, No. 27 of 1880, from an order of Maulvi Sami-ul-lah Khas, Subordinate Judge of Moradabad, dated the 27th November, 1879.

the appeal was admissible, in reference to the provisions of ss. 586 and 589, Act X of 1872," the order of reference being as follows :

PEARSON, J. (OLDFIELD, J., concurring).—This suit is in substance and effect merely a suit for damages. The establishment of the plaintiff's right to the property sold is, as a matter of course, necessary for the establishment of the right to damages. The plaintiffs are not seeking to recover as their own the property which has been sold, but damages on account of its sale. The sale is irrevocable; and the cancelment of the order disallowing their objection to the sale and claim to the property in the miscellaneous department is not sought for the purpose of preserving the property from sale. What is sought is a finding that the order was wrong and that the property really belonged to the plaintiffs, and this is sought with the view of establishing their claim to damages. Regarding the suit therefore as a suit for damages of an amount below Rs. 500, we have to consider whether this appeal is admissible in reference to the provisions of ss. 586 and 589, Act X of 1877. This question has been determined in the negative by a decision of a Division Bench of this Court, dated 29th August, 1879 (1), but we think it desirable to refer it to the Full Bench: referred accordingly.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Mir *Zuhur Husain*, for the respondent.

The following judgments were delivered by the Full Bench :

PEARSON, J., (STUART, C. J., and STRAIGHT, J., concurring).—The order which is the subject of the appeal is an order of the lower appellate Court remanding the case to the Court of first instance under s. 562, Act X of 1877, and is expressly declared to be appealable by s. 588 (28) thereof; and the only question for consideration is whether it is barred by the provisions of s. 586. That section, which declares that "no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not

(1) Unreported.

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exceed Rs. 500," is a part of a chapter which treats of appeals from appellate decrees, and is not applicable to appeals from orders which form the subject of a separate chapter. There is nothing in s. 589 which militates with the view above taken; indeed that section only indicates the Courts to which appeals from orders lie.

OLDFIELD, J.—I was a party to the decision in the case referred to in the order of reference, but after hearing the question discussed and on further consideration I am of opinion that this appeal is admissible. It is true that by s. 586, Civil Procedure Code, no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed Rs. 500; but the second appeal there intended appears to be a second appeal of the nature of those to which Chapter XLII and s. 584 relate, that is, a second appeal allowed on special grounds from appellate decrees; and the term second appeal as used in s. 586 will not in consequence apply to the appeal we are dealing with, which is a first appeal from an order, to which the provisions of Chapter XLIII apply, and which is therefore not excluded by any thing in s. 586, which has no reference to appeals from orders.

1880
June 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, and Mr. Justice Straight.

THE COLLECTOR OF BIJNOR, MANAGER OF THE ESTATE OF CHAUDHRI RANJIT SINGH, A MINOR, (DEFENDANT) v. MUNUVAR (PLAINTIFF).*

Public Officer—Notice of Suit—Collector of the District—Court of Wards—Disqualified Proprietor—Act X of 1877 (Civil Procedure Code), ss. 2, 424—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 194, 199, 204.

A Collector when acting under s. 204 of Act XIX of 1873 as the agent of the Court of Wards in respect of the estate of a disqualified person is a public officer within the meaning of ss. 2 and 424 of Act X of 1877, and consequently, when sued for acts done in that capacity, is entitled to the notice of suit required by the latter section.

THIS was a suit in which the plaintiff claimed from "the Collector of Bijnor, manager of the estate of Sherkot, placed under the Court of Wards" damages for the wrongful attachment and sale

* First Appeal, No. 25 of 1880, from an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 27th November, 1879.

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of certain moveable property in the execution of a decree held by the Court of Wards on behalf of the proprietor of that estate. The defendant set up as a defence to the suit that "the plaintiff had issued no notice to the Collector, a public officer, under s. 424, Act X of 1877, and therefore his claim was not cognizable." Upon the preliminary point whether or not the suit was cognizable by reason that no notice of suit had issued under s. 424 of Act X of 1877, the Court of first instance held that it was not cognizable for that reason, and dismissed it, its decision on that point being as follows: "On the first issue of law I find that, in my opinion, the plaintiff ought to have issued a notice, under s. 424, Act X of 1877, to the Collector of Bijnor, manager for the Court of Wards, and a public officer and servant, of his intention to institute a suit against him, and would have been competent to sue him on the expiration of the term specified in that section. For, although the Collector is impleaded as manager on behalf of a Government subject, yet the rules under s. 424 cannot be dispensed with even with reference to this capacity. Therefore this suit is not cognizable under that section." On appeal by the plaintiff the lower appellate Court reversed the decree of the Court of first instance upon the preliminary point stated above, and remanded the suit for re-trial, for the following reasons: "I do not concur in the Munsif's opinion. S. 424 does not apply to such a case. The claim is not against the Collector personally or as a public officer. In fact, it is a claim against the Rais of Sherkot, who is under the Court of Wards, and would affect his property alone. If a decree is passed, its amount would be recovered from the estate in question, while, if the claim is dismissed, the estate would benefit thereby. The Government has no interest in such profit or loss. The mere circumstance of the Collector being the manager of the estate, and of his being impleaded in that capacity, would not bring the case into the category of suits provided for by s. 424. In my opinion, therefore, the cognizance of the claim is not barred by reason of the notice not having been issued."

The defendant appealed to the High Court, contending that, as the suit was against a public officer officially in charge of an estate, the plaintiff was bound to give the notice prescribed by s. 424

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of Act X of 1877, and as he had failed to give such notice the suit should have been dismissed. The Division Bench (PEARSON, J., and OLDFIELD, J.,) before which the appeal came, on the 26th April, 1880, referred to the Full Bench the question "whether the Collector, as a manager of an estate under the Court of Wards, is a public officer, within the meaning of ss. 2 and 424, Act X of 1877."

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Mr. Conlan and Mir Zahur Husain, for the respondent.

The following judgments were delivered by the Full Bench :

STUART, C. J.—My answer to this reference is in the affirmative. Under s. 424, Act X of 1877, the Collector is in two positions, the first as the representative in India of the Secretary of State in Council, and next as a public officer, and as such entitled to the notice after the expiration of two months provided by s. 424.

PEARSON, J.—It has been elicited in the course of the discussion before the Full Bench that the Collector, although described as the manager of the estate, has not been appointed to be the manager of it under s. 199, Act XIX of 1873, by the Court of Wards, but merely acts as its agent in the matter under s. 204 thereof. This being so, there can be no doubt that his acts, which the present suit impugns, were done by him in his official capacity, and the answer to the question referred to us must be in the affirmative.

OLDFIELD, J.—The proprietor of the estate of Sherkot having become disqualified for the management of his own land under s. 194, Act XIX of 1873, the Board of Revenue assumed the superintendence of the property under the powers conferred upon it of a Court of Wards under ss. 193 and 195 of the Act. S. 204 of the Act permits the Court of Wards to exercise all powers conferred on it by the Act through the Collectors of the districts in which any part of the property of its wards may be situated, and in the present instance the said powers have been exercised by the Court of Wards through the Collector of Bijnor. The defendant in this

suit is the Collector of Bijnor, and in the exercise of the powers thus conferred on him by the Act he obtained a decree against one Muzaffar Khan in respect of a debt due to the estate under the Court of Wards' management, and in execution caused to be attached and sold certain property claimed by the plaintiff, and the latter brings this suit for recovery of damages arising out of those proceedings.

The position defendant holds is that of Collector of the District; the law permits the Court of Wards to exercise its powers through the Collector of the District; and the Collector when exercising these powers is discharging a part of the duties of his office as Collector of the District, and he is clearly a public officer within the meaning of s. 2, Act X of 1877, when *bonâ fide* employed in the discharge of the duties of his office of Collector of the District. Such was the case here; and the answer to the reference must be that the defendant in this suit is a public officer within the meaning of ss. 2 and 424, and that the suit is against him in respect of an act purporting to be done in his official capacity, and he is entitled to the notice required by the section. A case reported in the Indian Law Reports, 1 Bom., 318 (1), is in point.

STRAIGHT, J.—In reply to the question submitted to the Full Bench by this reference, I would say that the Collector of Bijnor was acting in reference to the estate of Chaudhri Ranjit Singh as a public officer, within the definition of Act X of 1877, and was therefore entitled to two months notice of action “in respect of an act purporting to be done by him in his official capacity.” In the course of the earlier part of Mr. Conlan’s argument for the respondent, I was under the impression that the Collector of Bijnor had been formally appointed manager of Sherkot by the Court of Wards under s. 199 of Act XIX of 1873, and I then entertained, as I still do, the opinion that it was *qua* manager, and not *qua* Collector, that his status must be determined. There is no provision in the Revenue Acts of these Provinces qualifying a Collector, as Collector, for the position of manager; and while he may be put “in charge” of a disqualified person’s estate and person by order of a Civil Court,

(1) *Narsingrav Ramchandra v. Laxumanrav.*

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if he is appointed a manager, it does not appear to me that he stands in a better or worse position than would a private individual, nor do I think he could be said to be acting in his "official capacity." This difficulty, however, does not arise in the present case. The Collector of Bijnor is not correctly speaking the manager of the estate of Chaudhri Ranjit Singh. No minute or order has been passed by the Court of Wards appointing him to such office, and he seems simply to be acting, *qua* Collector, under s. 204 of the Revenue Act of 1873, as the agent of the Court of Wards. He therefore retains in the fullest sense his character and position of Collector and as such is of course a public officer within ss. 2 and 424 of the Civil Procedure Code.

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June 14.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

UMR-UN-NISSA (PLAINTIFF) v. MUHAMMAD YAR KHAN AND OTHERS
(DEFENDANTS).*

Suit for possession of Immoveable Property—Adverse Possession—Act XV of 1877 (Limitation Act), sch. ii, art. 144.

I died in 1861 leaving a zamindari estate, a moiety of which at the time of his death was in the possession of a mortgagee. On the death of I the defendants in this suit, who were among his heirs, caused their names to be recorded, as his heirs, as the proprietors of such estate, to the exclusion of the plaintiff in this suit who was his remaining heir; and they appropriated to their own use continuously for more than twelve years the profits of the unmortgaged moiety of such estate, and the *malikana* paid by the mortgagee of the mortgaged property. In 1877 the defendants redeemed the mortgage of the mortgaged moiety of such estate from their own moneys. In 1878 the plaintiff sued for the possession of her share by inheritance of such estate. *Held* (SPANKIE, J. doubting), with reference to the mortgaged moiety of such estate, that the possession of the defendants in respect of such moiety did not become adverse, within the meaning of art. 144 of sch. ii of Act XV of 1877, on the death of I in 1861, but on the redemption of such moiety in 1877, "adverse possession" under that article meaning the same sort of possession as is claimed, that is to say, in this case, full proprietary possession, which was not the nature of the possession of the defendants until the redemption of the mortgage, and the suit therefore, in respect of such moiety, was within time.

THE plaintiff in this suit claimed possession of 10 biswansis 8½ kachwansis of a 2½ biswas share of a village called Charra Rafat-

* Second Appeal, No. 990 of 1879, from a decree of C. W. Moore, Esq., Judge of Aligarh, dated the 23rd June, 1879, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 14th February, 1879.

pur, being her share according to the Muhammadan law of inheritance of the landed estate of her father, Izzat Khan. The defendants were the remaining heirs of Izzat Khan, two of them being his son and daughter, respectively, and the third defendant being his widow. Izzat Khan died on the 31st July, 1861, and at the time of his death a moiety of his $2\frac{1}{2}$ biswas share was under mortgage and in the possession of the mortgagee. In 1877 the defendants redeemed the mortgage of this moiety. The present suit was instituted on the 11th September, 1878. The plaintiff alleged in her plaint that "the mortgaged moiety of the $2\frac{1}{2}$ biswas share came into the possession of the defendants on redemption of the mortgage; that on the death of Izzat Khan she with the defendants came into possession and enjoyment of the unmortgaged moiety; but from 1282 fasli (Sept. 1874—Sept. 1875) the defendants discontinued paying her her share of the profits; and hence she sued for possession of her share of the estate." The plaintiff also claimed mesne profits from 1283 to 1285 fasli.

The defendants set up as a defence to the suit, amongst other things, that it was barred by limitation. They stated as follows: "The plaintiff's suit is barred by limitation: Izzat Khan died on the 31st July, 1861, and the defendants took possession of all the property left by him: the plaintiff neither got possession nor did she in any way enjoy the profits of the property left by Izzat Khan".

The Court of first instance held that the suit was barred by limitation, the material portion of its decision being as follows:—"On the first issue the Court finds that, when the plaintiff's suit for possession of the property left by her father Izzat Khan has been instituted in Court after twelve years from the date of the death of her father, her suit is clearly barred by limitation; and this bar cannot in any way be removed without proof of one of the two following points:—(i) That after the death of Izzat Khan the plaintiff continued to mess and live jointly with her mother and brother till 1282 fasli, as she did in his lifetime, and enjoyed the profits of the property left by her father jointly with them: (ii) That she continued to receive her legal share of the profits of the paternal estate privately. Now the Court has to observe whether the plaintiff has proved either of the points above set forth by

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sufficient and good evidence or not. After a mature and careful consideration of all the facts of the case and the evidence, the Court is decidedly of opinion that she has not done so. No documentary evidence is on the record to prove and corroborate the fact that she continued to live and mess jointly with her brother and mother, or that she continued to receive her legal share of the profits of the paternal estate. The oral evidence adduced on her part is intended to support the first point, and if this evidence be admitted, it must also be accepted that the plaintiff has been messing and living jointly with the defendants within twelve years. But the oral evidence is so worthless and false that the Court can give no credence whatever to it..... It was argued that, even if the plaintiff failed to substantiate the facts which would have removed the bar of limitation, still her claim for possession of her share of the mortgaged $1\frac{1}{4}$ biswas must be decreed, inasmuch as it had been mortgaged by Izzat Khan, and it was in 1281 fasli (1877) that the said share was redeemed from mortgage and came into the possession of the defendants, and that counting from the date of the defendants' possession, this suit was within the period of twelve years. But the Court cannot attach so much weight to this argument as the plaintiff's counsel wishes it to believe it possesses. In the opinion of the Court, the plaintiff's cause of action in respect of this $1\frac{1}{4}$ biswas also arose at the time when the defendants caused their names to be entered in respect thereof in the column of proprietors, enjoyed the *malikana* dues that were paid on account of that share, and began to pay the mortgage-money thereon from the income of their unmortgaged $1\frac{1}{4}$ biswa share, and it is an admitted fact that more than twelve years have passed since." On appeal by the plaintiff the lower appellate Court reversed the decision of the Court of first instance on the question of limitation, and remanded the case for the trial of the issues, amongst others, "Was the mortgage redeemed entirely from the income of the $1\frac{1}{4}$ biswas not mortgaged: if not, how much of the money required to redeem the mortgage was paid from the private resources of the defendants". The material portion of the lower appellate Court's decision was as follows: "The lower Court has found that there is no reliable evidence that plaintiff ever had

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any share in the profits since her father's death and throughout the suit. But the lower Court has also found that the mortgage on the $1\frac{1}{2}$ biswas was redeemed from the income of the other $1\frac{1}{2}$ biswas unmortgaged. This being so, it is not clear how there were any profits to share in, until the said mortgage was redeemed, two or three years ago. This Court, therefore, cannot agree with the lower Court that the defendants have shown plaintiff to be out of possession for more than twelve years under circumstances to bar her suit." The Court of first instance, pointing out that the remarks in its decision which led to the remand were erroneous, and that there were no grounds for such remarks, found that the mortgage in question was not redeemed with any portion of the profits of the unmortgage $1\frac{1}{2}$ biswas, but was redeemed out of the private income of the defendants. On the return of these findings the lower appellate Court held that the suit was barred by limitation, "in that the plaintiff had not had possession of any part of the property, mortgaged or unmortgaged, for more than twelve years."

The plaintiff appealed to the High Court, contending that, in respect of the mortgaged $1\frac{1}{2}$ biswas, her suit was within time, as the possession of the mortgagee was not adverse to her, and the defendants only obtained possession of that share in 1877 on redemption of the mortgage.

The Division Bench (SPANKIE, J., and OLDFIELD, J.,) before which the appeal came for hearing referred to the Full Bench, with reference to this contention, the question as to whether the term "adverse possession" in No. 144, sch. ii of the Limitation Act of 1877, is confined to actual and physical possession only. The order of reference was as follows:

SPANKIE, J.—I am not satisfied that the possession referred to in art 144 of the Limitation Act necessarily means physical and actual possession. So far as the defendants, the ostensible representatives of the original mortgagor, are concerned, the possession of the mortgagee was not adverse. The mortgagee recognized them as representatives of the mortgagor and as having the equity of redemption, inasmuch as he paid a proprietary allowance for them. The mortgagee's possession was their possession; but the position of the defendants towards the plaintiff was altogether

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different. From the death of the original mortgagor, Izzat Khan, the father of plaintiff, the defendants at once asserted a position hostile to the plaintiff. They recorded their own names, and not her's, as succeeding to Izzat Khan's estate, and they took and appropriated her share of the proprietary allowance received from the mortgagee. They did this from the time of the death of Izzat Khan in 1861. It is a mistake I think to say that defendants make any admission favourable to the plaintiff in this case. They entirely disputed her claim to possession of any portion of the property in suit. It is true that the omission to record her name as heir of Izzat Khan and as one of the owners of the property mortgaged might not be conclusive by itself against the plaintiff, but it is a circumstance in the case and has to be weighed. The Courts below have both found on the evidence that plaintiff never at any time succeeded to any portion of her father's estate, but that the defendants remained in possession of the property left by him. As the omission to record the name of the plaintiff was followed by the appropriation of the proprietary allowance received from the mortgagee, it would seem that the defendants were actually asserting a title in themselves hostile to the plaintiff; and as they themselves held all the possession in respect of the mortgaged property that the circumstances of the mortgage admitted of, and full and actual possession of all the other unmortgaged property, the plaintiff should have sued to establish her right to be considered one of the original mortgagor's representatives and entitled to a share of the proprietary allowance, and as she did not do so, her right to the property in suit, as provided in s. 28 of the Limitation Act, has possibly been extinguished. But as this view is so entirely opposed to that entertained by my honorable colleague Mr. Justice Oldfield, it might be advisable that we should lay the case before the Court at large for an expression of their opinion, whether or not in art. 144 of the Limitation Act adverse possession is confined to actual and tangible and physical possession only; and I would prefer to reserve my final and complete opinion on the point until the hearing of the case before the Full Bench.

OLDFIELD, J.—The property in suit is a $2\frac{1}{2}$ biswas share of Izzat Khan, the father of the plaintiff and of the defendants Yar

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Khan and Kamr-un-nissa, and the husband of Rahim-un-nissa. The plaintiff avers that $1\frac{1}{4}$ biswa was mortgaged and in the possession of the mortgagees at the time of Izzat Khan's death, and was redeemed as lately as 1284 fasli, and came into the possession of the defendants, and that the other $1\frac{1}{4}$ biswa, not mortgaged, came into the joint possession of herself and defendants on Izzat Khan's death, but defendants, in 1282 fasli, refused her the profits, and she sues for her legal share of the whole $2\frac{1}{2}$ biswas and mesne profits. The fact that the $1\frac{1}{4}$ biswa was mortgaged and in the possession of the mortgagees until 1284, when it was redeemed and came into possession of the defendants, is not disputed, and they do not dispute her right, as heir to her father, to the share she claims, but they plead that the suit is barred by limitation, that she cannot recover her share of the mortgaged $1\frac{1}{4}$ biswa without paying a proportionate amount of the mortgage-debt, which they paid, and they object to the amount of mesne profits claimed. The Court of first instance held that there was nothing to show that from the death of her father in 1861 the plaintiff had ever had any possession over the unmortgaged property, which was adversely held by the defendants. With respect to the mortgaged $1\frac{1}{4}$ biswa share, a contention was raised by the plaintiff's counsel that the Limitation Law would not apply to the mortgaged $1\frac{1}{4}$ biswa, inasmuch as it was not redeemed till 1284, when it came into the defendants' possession, and there would be no adverse possession on their part till the time of redemption, since when twelve years have not elapsed. The Subordinate Judge disposed of this contention on the ground that the plaintiff's cause of action arose when the defendants asserted their right to the property by causing their names to be entered in the revenue records, and took for themselves certain *malikana* dues paid on account of that share, and began to pay the mortgage-money thereon from the income of their unmortgaged share, since which date more than twelve years had elapsed; and the Subordinate Judge dismissed the suit on the ground that it was barred by limitation. On a remand being made, the Subordinate Judge held that the mortgaged $1\frac{1}{4}$ biswa had not been redeemed out of the profits of the unmortgaged property, and he pointed out that there was an error in that part of his judgment in which he had stated that defendants had been paying off the mortgage from the profits

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of the unmortgaged share, and he held that, in point of fact, it had been satisfied from other assets. The Judge, on the plaintiff's appeal, has accepted the finding that the unmortgaged share was not redeemed from profits of the mortgaged share, and has held in consequence that the suit is barred by limitation, "in that plaintiff has not had possession of any part of the property or proceeds of the property, mortgaged or unmortgaged, for more than twelve years." The Judge, however, further disposes of the suit on the merits, holding that, if the suit be not barred, plaintiff is entitled to the share claimed and Rs. 103-13-0 mesne profits. The plaintiff has appealed to this Court.

In so far as the objections taken in appeal refer to the unmortgaged $1\frac{1}{2}$ biswa, they must be held to fail, as the finding is one of fact, to which no valid objection can be sustained, to the effect that defendants held possession of that share since the death of Izzat Khan adversely to the plaintiff. But the objection taken in appeal in respect of the mortgaged share appears to me to be valid. Admittedly art. 144, sch. ii, Act XV of 1877, is the law of limitation applicable, and the time from which the period of limitation begins to run is "when the possession of the defendant becomes adverse to the plaintiff." We have to look, not to the fact of plaintiff's possession as the Judge seems to think, but only to whether the possession of defendants became adverse to the plaintiff twelve years before the suit was instituted. The question depends on the meaning of the terms "possession" and "adverse possession" as used in the article. Lord St. Leonards, in his Handy-book on Property Law, 7th ed., p. 214, says:—"The term discontinuance of possession means abandonment of possession by one person, *followed by the actual possession of another person*, otherwise there would be no person in whose favour time would run." It would thus seem that there must be actual possession on the part of the person setting up an adverse title by possession. Turning to the Roman Law to ascertain what was understood by possession, we find in Sandars' Institutes of Justinian, page 51 (Introduction, s. 67): "To the notion of *dominium* was opposed that of *possessio*. A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *deter-*

tion, to use the technical term, of the thing; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor had no rights over the thing; but he was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed"; and at page 174: "A person may not be the owner of a thing, and yet may be in a position to exercise all the rights of an owner over it, and may exercise it, with the intention to do so, as if he were the owner. He is then in Roman law called

See also Commentaries of Gaius by Tomkyns and Lemon, p. 257.

the *possessor* (see Introd. sec. 67), as opposed to a *dominus* or real owner."

And at page 429 of the Institutes, it is stated that the contract of *pignus* gave the possession of the thing pledged to the creditor, but left the property in the thing with the debtor: the *hypotheca* left both the property and the possession with the debtor.

See also Story's Equity Jurisprudence, 11th ed., vol. 2, p. 223.

A mortgagee would, in the above sense of the term, be in possession, while the mortgagor, or the defendants in this case, would not have possession, prior to redemption of the mortgage, nor am I inclined to consider that it will be otherwise under the Limitation Law.

The plaintiff and defendants are all representatives of the original mortgagor, who appears under the terms of the mortgage to have received, as long as he lived, certain sums by way of an annuity from the mortgagees, but the receipt of this annuity did not affect the possession of the mortgagees on the property mortgaged; and if, since the mortgagor's death, defendants have appropriated the annuity to the exclusion of plaintiff, or asserted their right by causing entry of their names as proprietors in the revenue registers, those acts cannot affect the fact of possession of

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the property, or convert the possession of the mortgagees into a possession of the defendants, or constitute a possession of the property in the defendants adverse to the plaintiff, possession in the legal sense being in the mortgagees prior to redemption of the mortgage. I may add that before redemption plaintiff had no present right to possession or to sue for possession. All she might have done was to have sued for a declaration of her right and to recover the annuity, supposing she knew of the acts of the defendants; but because she did not do so, she will not be debarred her remedy by suit for possession, when such a remedy opens out to her on the mortgagees giving up possession, and so long as this remedy has not become barred by the provisions of art. 144, and it is only with the interpretation and application of this article that we have to do. I am aware that a majority of the Judges of this Court, I being one, held that the purchaser of the equity of redemption of immoveable property, which is at the time of sale in the usufructuary possession of the mortgagee, takes actual possession of the subject-matter of the sale within the meaning of that term in art. 10, sch. ii, Act IX of 1871, when the equity of redemption is completely transferred to and vested in him (1). That was a ruling under the former Limitation Law in respect of a suit brought to enforce the plaintiff's right of pre-emption in respect of a sale of property which was at the time of sale in the possession of usufructuary mortgagees. There the subject of sale was the equity of redemption which it was held at the time of sale was completely conveyed to and vested in the purchaser, who might be said to have obtained at time of sale actual possession on the subject of the sale, that is, the equity of redemption. That ruling was, however, opposed to a previous Full Bench ruling of this Court, *Gordhun v. Heera Singh* (2), and also to a decision of the Calcutta Court under Act XIV of 1859, and was dissented from by the Chief Justice. The question which was under decision in that case was not, however, the same as the one now before us. We have here to determine what constitutes adverse possession of immoveable property, not merely actual possession under a sale, where the subject of sale was an equity of redemption in immove-

(1) In *Jageshar Singh v. Jawahir Singh*, 1 L. K., 1 All., 311. (2) S. D. A., N.-W. P., January to May, 1866, p. 181.

able property; and possession to be adverse in respect of immovable property or an interest in such property must be actual possession of the property or interest itself, which, so long as the property is in the usufructuary possession of a mortgagee, cannot be said to be held by any one else but the mortgagee. I am therefore disposed to disallow the finding that the plaintiff's suit in respect of the $1\frac{1}{4}$ biswa mortgaged share is barred by limitation; but I acquiesce in Mr. Justice Spankie's suggestion that the question as to the meaning of the term possession in art. 144, and whether the suit in respect of the $1\frac{1}{4}$ biswa mortgaged share is barred under that section, be referred for the opinion of the Full Bench.

Pandit *Ajudhia Nath* and *Lala Harkishen Das*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Babu Oprokash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Full Bench:

STUART, C. J.—I have felt little difficulty in forming an opinion on the question submitted to us in this reference, and I may say at once that in my judgment the defendants cannot plead possession adverse to the plaintiff within the meaning of art. 144, sch. ii of the present Limitation Act XV of 1877.

The case presents a remarkable and somewhat painful illustration of native family life. The parties, plaintiff and defendants, are all members of the same family and closely connected in that relation, the plaintiff *Umr-un-nissa* being a daughter and the defendants the son and widow of *Izzat Khan*, the deceased husband and father, and *Kamr-un-nissa* another daughter. This *Izzat Khan* died in 1861, or 1268 fasli, leaving an estate of, or as a portion of his estate, $2\frac{1}{4}$ biswas zamindari rights in the village of *Charra Rafatpur*, in the district of *Aligarh*. One half of that property or $1\frac{1}{4}$ biswas had been mortgaged by him, and the mortgage was subsisting at the period of his death, and it continued in the possession of the mortgagee till 1284 fasli or for about sixteen years after *Izzat Khan's* death, when, as before stated, it was redeemed.

Now there can be no doubt that up to this period the property mortgaged was in precisely the same position, as respects the law

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of limitation or otherwise, as if Izzat Khan himself had lived till then, but that being dead his heirs (that is, those who are entitled to represent him in respect of the mortgaged property) were similarly situated, neither more nor less, the possession of the mortgagee being up to the time of redemption the possession of all those without distinction who are now in right of the original mortgagor, in other words, the parties on both sides in the present suit. That right and interest so represented absorbed for the time and until redemption the entire estate in the mortgaged property, so that there was nothing left in the way of possession or otherwise for the one party in the family to plead against the other. In other words, Izzat Khan's widow and children had, at the period mentioned, precisely the same rights as Izzat Khan himself could have asserted had he lived till 1284 fasli. How it was that the family came to quarrel among themselves, and to such an extent as the present suit shows, one side after paying up the mortgage-debt eagerly pleading the law of limitation against the other, is not explained. The plaintiff is as I have already stated a daughter of Izzat Khan, and why her mother and other members of her family should have combined to deprive her of her natural rights it is not easy to understand. Be that as it may, something must have occurred to have brought them into collision with each other, and now we have simply to say whether the plaintiff is debarred from asserting and vindicating those rights of her's by the law of limitation pleaded. That she is so debarred in respect of the unmortgaged property is only too clear, the limitation period running against her from the time of her father's death in 1861, or 1268 fasli. But her position with respect to the mortgaged property is altogether different, for that portion of the property remained in precisely the same relation to the whole family as if Izzat Khan had continued to live till 1284 fasli, until when there was not, and could not have been from the nature of the case, any adverse possession on one side or the other, the mortgagee possessing until his mortgage disappeared by discharge of the mortgage-debt.

The Full Bench case referred to at the hearing, *Jageshar Singh v. Jawahir Singh* (1), is not in all respects in point. The limita-

(1) I. L. R. 1 All., 311.

tion question there arose in a pre-emption suit and related to the time under art. 10, sch. ii of the former Limitation Act IX of 1871, "when the purchaser takes actual possession under the sale sought to be impeached." But I fully adhere to the definition I gave in my judgment in that case of the meaning of the term "actual possession," as being "personal and immediate enjoyment of the profits." Now the only party having such possession in the present case was the mortgagee, and as he continued to represent, until the time of redemption, the interest of the mortgagor, there was nothing left in the way of possession for the one party to assert against the other. He possessed for them both up to and inclusive of the period of payment of his mortgage-debt, and when his incumbrance was removed the members of the family were left to their natural and equal rights, and there therefore could not possibly be adverse possession of any kind among them.

There must of course be an accounting among the parties respecting the redemption money and the mesne profits since redemption, but subject to such accounting the plaintiff is not precluded by art. 144, sch. ii of the present Limitation Act XV of 1877, from claiming her share of the $1\frac{1}{2}$ biswa which had been mortgaged by her father.

PEARSON, J.—In my opinion, in order to bar the suit under art. 144, sch. ii, Act XV of 1877, the adverse possession of the defendants must be of the same nature as that sought by the plaintiff. Now the possession sought by the plaintiff in this suit in respect of that portion of the property in suit which was mortgaged by Izzat Khan is full proprietary possession, and the defendants have only had full proprietary possession of that portion since its redemption from mortgage in 1284 fasil or 1877 A.D. Before that year it was in the possession of a mortgagee whose possession was not adverse to either party, and the circumstance that, during the period between Izzat Khan's death in 1861 and the redemption of the mortgage in 1877, the *malikana* or proprietary allowance due to both parties from the mortgagee was exclusively appropriated by the defendants is not equivalent to adverse possession of the mortgaged property by them during that period.

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SPANKIE, J.—I am willing to accept the opinion of my honorable colleagues on the point referred and to hold that art. 144 of the new Limitation Law does not bar the suit. At the same time I confess that the facts of the case are such that I still remain doubtful. It is not a question between a person having the equity of redemption suing the mortgagee. The latter is not concerned with the case. The plaintiff asserted that on her father's death she did obtain possession of the unmortgaged property and all the possession she could get of the mortgaged property left by him, and the Courts below have both found on the evidence that the plaintiff never at any time obtained possession of any portion of her father's estate, but that defendants remained in possession of all the property. They would not allow her name to be recorded as a proprietor, and appropriated her share of the proprietary allowance paid by the mortgagee to the mortgagor. They asserted a title hostile to her share and had all the possession that the circumstances admitted of. It is admitted now that she loses half the property, to that extent her suit being barred. I find it difficult to hold that her cause of action did not arise after her father's death when the defendants refused to admit her title.

OLDFIELD, J.—I have but little to add to what I have stated in the referring order. A person setting up adverse possession within the meaning of the Limitation Act must I apprehend show that he has exercised what is technically termed *detention* of the property for himself as owner to the exclusion of the person claiming against him, or that such *detention* if exercised by another was exercised for him, and the term *detention* has been defined to be "the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded."—Savigny on Possession, translated by Sir Erskine Perry, 6th ed., page 2. Any successful assertion of adverse possession in the immoveable property mortgaged on the part of the defendants against plaintiff in the case before us appears to me incompatible with the position of the mortgagees, so long as they remained in possession of the property. I find it stated in Brown's Law Dictionary, page 16: "The possession of a mortgagee is adverse to the title of the mortgagor," and the author observes

that precisely because it is such, it will mature by length of duration and non-acknowledgment into an absolute and independent legal right, and, no doubt, there is considerable force in this argument; and in *Cholmondely v. Clinton*, 2 Jac. and Walk., cited in Story's Equity Jurisprudence, 11th ed., vol. 2, page 229, it is remarked: "The mortgagee, when he takes possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit." If this be the position of the mortgagee, there could be no possession on the part of defendants adverse to the plaintiff before redemption of the mortgage; and it will make no difference in this case if we consider the mortgagees to be dealing with the property for the mortgagors and not adversely to them, for the detention of the property exercised by the mortgagees will enure for the benefit of plaintiff quite as much as defendants, since she is an heir at law of the original mortgagor and might have exercised her right to redeem the mortgage at any time so long as it was capable of redemption; and the mere payment of the annuity by the mortgagees to one of the heirs of the original mortgagor after his death will not affect the relation between plaintiff and the mortgagees.

I am of opinion that the claim in respect of the $1\frac{1}{4}$ biswa mortgaged share is not barred by art. 144, sch. ii of the Limitation Law.

STRAIGHT, J.—I concur in the view indicated by my honorable colleague Mr. Justice Oldfield, and I hold that the possession in the present case as contemplated by art. 144, sch. ii of the Limitation Act, began in 1284 fasli when the mortgage was redeemed.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

SARNAM TEWARI AND ANOTHER (DEFENDANTS) v. SAKINA BIBI (PLAINTIFF).*

Jurisdiction of Revenue Court—Wajib-ul-arz—Act XVIII of 1873 (N.-W. P. Rent Act), s. 93 (a)—Landholder and Tenant—Second appeal—Suit of the nature cognisable in Small Cause Court—Act X of 1877 (Civil Procedure Code), s. 586.

A suit by a landholder against a tenant for Rs. 130, being the value of a moiety of the produce of a grove of mangoe trees held by such tenant, such

* Second Appeal, No. 152 of 1880, from a decree of J. W. Power, Esq., Judge of Ghāsiipur, dated the 10th December, 1879, reversing a decree of C. Rustomjee, Esq., Assistant Collector of the first class, dated the 30th September, 1879.

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amount being claimed in virtue of an agreement recorded in the *wajib-ul-arz*, and not in virtue of any custom or right, is not cognizable in the Revenue Court, but is cognizable in a Court of Small Causes, and consequently no second appeal in the suit will lie.

THE plaintiff in this suit, who was zamindar of manza Bishenpur, claimed from the defendants her tenants, under s. 93 (a) of Act XVIII of 1873, "Rs. 130, value of mangoes on account of 1286 fasli, after deducting the right of the tenants, on a balance sheet signed by the patwari." In the plaint it was stated as follows: "A mango grove is situated on the plaintiff's zamindari estate: the defendants have all along given half the fruits yielded by the grove to the zamindar: on account of the present year (1286 fasli) Rs. 130 are due to the plaintiff, the zamindar of the mahál, being the value of 35,000 mangoes out of 70,000 mangoes: notwithstanding that the crop had been appraised, the defendants appropriated all the mangoes including those to which the plaintiff was entitled, and they have not paid the plaintiff, zamindar, a single pice." The *wajib-ul-arz*, or administration-paper, of Bishenpur framed in 1843 contained a declaration by the zamindar regarding the grove in question and other groves to this effect, viz.: "Four groves have been planted by the tenants and the planters thereof are in possession of the fruit thereof: I take whatever quantity of fruit they give me of their own accord." The *wajib-ul-arz* of that village framed in 1863 declared that the zamindar was entitled to take one moiety of the produce of the groves. The Assistant Collector dismissed the suit on the ground that the zamindar of Bishenpur had not at any time received any share of the produce of the grove in question in virtue of zamindari right, and the plaintiff's suit was therefore not maintainable under s. 93 (a) of Act XVIII of 1873. On appeal by the plaintiff the lower appellate Court, having regard to the *wajib-ul-arz* of 1863, held that the plaintiff was entitled to a moiety of the produce of the grove, and gave her a decree.

On second appeal by the defendants to the High Court it was objected on the plaintiff's behalf that the suit was one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie.

Lala Ialta Prasad, for the appellants.

Mr. Conlan and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the respondent.

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The Court (STUART, C. J. and STRAIGHT, J.) delivered the following

JUDGMENT.—This suit was originally brought in the Court of the Assistant Collector of Gházipur by the plaintiff-respondent, who is a zamindar, against defendants-appellants, who are tenants, to recover the value of half the produce of a grove of mangoe trees, estimated at Rs. 130, upon the basis of a contract contained in the *wajib-ul-arz* of 1863. The Assistant Collector dismissed the claim, but on appeal it was decreed and the defendants now appeal to this Court. At the hearing a preliminary objection was taken by the counsel and pleader for the plaintiff-respondent to our entertaining the case on the ground that the suit did not fall within the terms of clause (a), s. 93 of the Rent Act, but was in reality based upon a contract, and as such, being cognizable by a Small Cause Court, a second appeal was prohibited by s. 586 of the Civil Procedure Code.

We are of opinion that this objection is fatal. The plaintiff claims the amount in suit by virtue of an agreement to which the defendants were parties as recorded in the *wajib-ul-arz*. She does not sue for dues payable to her in respect of any custom or right, as contemplated by cl. (a), s. 93 of the Rent Act, and she therefore ought to have taken her case to the Small Cause Court, if there be one in the district, whose decision would have been final. The incident therefore arises that the plaintiff, in order to prevent our hearing this appeal, seeks to take advantage of her own error in bringing her suit in the Revenue Court. For if her contention be right, the Judge might, assuming there is a Small Cause Court in her district, have dismissed her appeal on the ground that her claim had been laid in a Court that had no jurisdiction to entertain it, and s. 206 of the Rent Act would have been unavailable. It is true that the objection now urged was not taken by the defendants when respondents before the Judge, and the appeal appears to have been disposed of as an ordinary revenue case under s. 189 of the Rent Act; but we do not think we can avoid now taking notice

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of it going as it does directly to our jurisdiction to hear this appeal. In our opinion, the plaintiff's suit being of a nature cognizable by a Small Cause Court, a second appeal is precluded by s. 586 of the Civil Procedure Code. The preliminary objection must therefore prevail and the appeal will accordingly be dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Pearson and Mr. Justice Oldfield.

DEBI PRASAD AND OTHERS (DEFENDANTS) v. JAFAR ALI (PLAINTIFF).*

Determination of Title by Revenue Court—Res judicata—Estoppel—Act IX of 1871 (Limitation Act), s. 29 and sch. ii, arts. 14, 15, 118, 145—Limitation—Suit for possession of immovable property—Suit for a declaration of proprietary right.

In 1864 the defendants served a notice upon the plaintiff demanding rent for land in his possession for which the plaintiff had not paid them rent previously. The plaintiff thereupon instituted a suit in the Revenue Court contesting his liability to pay rent for such land on the ground that he was the proprietor thereof. A decree was made in that suit on the 16th August, 1865, directing the plaintiff to execute a *kabuliyat* to pay the defendants rent for such land at a certain rate. The plaintiff did not appeal from that decree, but from its date until August, 1877, paid the defendants rent for such land. On the 8th August, 1877, the plaintiff instituted the present suit against the defendants in the Civil Court in which he claimed a declaration of his proprietary right to such land, and to be maintained in possession thereof as proprietor, free from the liability to pay rent, and to have the decree of the Revenue Court dated the 16th August, 1865, declared null and inoperative. *Held* that, the plaintiff's suit in the Revenue Court not being one which that Court was competent to entertain, the decision in that suit could not be held final on the question of title raised in the present suit; that there was nothing in the conduct of the plaintiff which estopped him from instituting the present suit; that the limitation applicable to the present suit was not that provided by art. 118 of sch. ii of Act IX of 1871, but that provided by art. 145 of that schedule, a suit by a person in the possession of land for a declaration of proprietary right being substantially a suit for possession of immovable property, and the present suit was therefore within time; and that arts. 14 and 15 of that schedule were not applicable, there being no decree or order which the plaintiff was bound to have set aside within one year.

THE plaintiff in this suit, who was in the possession of twelve bighas twelve biswas of land situate in a village called Sudiapur,

* Second Appeal, No. 132 of 1880, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 8th December, 1879, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 30th March, 1878.

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claimed "a declaration that he was the proprietor of such land, to be maintained in proprietary possession thereof, to be protected from payment of rent to the defendants in respect thereof, and to have a decree, dated the 16th August, 1865, declared null and void." The defendants were the proprietors of Sudiapur. The land in suit had formerly belonged to one Umrao Mir Khan and one Saiyad Mir Khan, and had been confiscated by the Government in or about the year 1858, and subsequently conferred by the Government on the plaintiff in exchange for other land held by him. In 1864 the plaintiff was served with a notice in writing in which the persons represented by the defendants claimed rent for the land in suit at the rate of Rs. 58-12-0 per annum. On the 8th April, 1864, the plaintiff instituted what purported to be a suit under s. 14 of Act X of 1859 contesting his liability to pay such rent, alleging that he was the proprietor of the land. On the 16th August, 1865, the District Judge, on appeal by the defendants from the decision of the Deputy Collector in such suit, made the decree which the plaintiff sought in the present suit to have declared null and void. That decree directed the plaintiff to execute and deliver to the defendants a *kabuliyat* agreeing to pay rent for the land in suit at the rate of Rs. 35-4-0 per annum. From the date of that decree the plaintiff paid the defendants rent for the land in suit at that rate. The present suit was instituted by the plaintiff on the 8th August, 1877.

The defendants stated in defence of the suit as follows :—"The land in suit is part of a garden measuring forty-two bighas of which Umrao Mir Khan and Saiyad Mir Khan were the original owners: their rights were confiscated by Government on account of their rebellion: the Government gave the garden and land confiscated by way of compensation for a garden of which the plaintiff was in possession as a tenant and which the Government appropriated: the plaintiff cut down the trees of the garden and caused it to be brought under cultivation: he having converted the garden land to agricultural land, the zamindars served him with a notice of assessment of rent under Act X of 1859: the plaintiff sued the zamindars in the Revenue Court to impeach the propriety and legality of the notice and got a decree on the 24th December, 1864:

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on appeal to the Judge a decree was passed in favor of the zamindars charging the land with rent at Rs. 3 per bigha: the plaintiff did not appeal specially from the decree of the Judge: since 1865 the plaintiff has regularly paid the rent decreed against him: the land having been charged with rent by a competent Court, no fresh suit will lie to contest the plaintiff's liability to pay rent: the plaintiff is not now competent to claim to be declared the proprietor of the land: the decree of the Judge is not null and void."

The Court of first instance gave the plaintiff a decree declaring that the plaintiff was the proprietor of the land in suit, its decision being as follows:—"The suit filed by the plaintiff in the Court of the Deputy Collector of Allahabad was not really a suit under s. 14 of Act X of 1859. It is not denied by the defendants that the plaintiff never before the notice was served on him paid rent for the land in dispute. The notice which was served upon the plaintiff was not a notice under s. 13 of that Act. The suit had really for its object to establish the plaintiff's non-liability to pay rent for the land on the ground that he and not the zamindars was its proprietor. Such being the case, the Revenue Court had no jurisdiction to hear it according to the provisions of any law in force in 1864 or 1865. The Judge in trying an appeal from a decision of an Act X Court could not exercise a higher jurisdiction than the latter Court. In my humble opinion, the decision of the Judge of Allahabad, dated the 16th August, 1865, was *ultra vires*. I record this opinion with due deference to the learned Judge who passed it. Even assuming that the Judge had jurisdiction to pass that decision in an Act X suit, it would not be binding on a Civil Court trying a question of proprietary title to land between conflicting claimants. It has been held by the Privy Council in *Rhugunolee Singh v. Hossein Bux Khan* (1) that an Act X Court is not competent to adjudicate on a question of title. The plaintiff, it is admitted, has paid rent since the date of the decree, but that circumstance does not seem to me to have the legal effect of estopping the plaintiff from bringing this suit. It is indirectly admitted by the defendants in their written statement that Umrao Mir Khan and Saiyad Mir Khan were proprietors of the garden as well as of

(1) 7 B. L. R., 673.

the land covered by it which was confiscated by Government. It was decided by the Judge of Allahabad on the 20th March, 1866, in another Act X suit to which the zamindars of mauza Sudiapur were parties, that Umrao Mir Khan and Saiyad Mir Khan were proprietors of the forty-two bighas of land of which the property in dispute is a part, and that the persons to whom Government granted it became its proprietors. This decision of the Judge is not conclusive evidence on the question of proprietary title in a civil suit, but it affords some evidence which the defendants were bound to rebut, but they failed to do so. The plaintiff therefore is the proprietor of the land in dispute, and as he has instituted this suit before he had paid rent to the defendants for twelve years, his proprietary title has not yet been extinguished. The plaintiff is only entitled to a decree declaring him to be the proprietor of the land in dispute." On appeal by the defendants the lower appellate Court affirmed the decree of the Court of first instance.

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On second appeal by the defendants to the High Court, it was contended on their behalf, *inter alia*, that the plaintiff, having accepted the position of tenant, could not dispute the title of the defendants as landholders; that the payment of rent by the plaintiff amounted to a waiver of his right as owner to the land; that the plaintiff could not question the validity of the decree of the 16th August, 1865, having originated the proceedings in which that decree was made, and that decree was conclusive as between the parties to the present suit; and that the suit was barred by limitation.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit *Ajudhia Nath*, for the appellants.

The *Senior Government Pleader* (Lala Juala Prasad), Munshi *Ram Prasad*, and Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The suit is in respect of a garden, twelve bighas twelve biswas, part of land which once belonged to Umrao Mir

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Khan and Saiyad Mir Khan, and which was confiscated by Government about 1858 for rebellion. The land in suit was subsequently transferred to plaintiff by Government in exchange for other land. It appears that in 1864 defendants, or rather those whom the defendants before us represent, served a notice on plaintiff demanding rent on the land: plaintiff filed a suit in the Revenue Court to contest the demand: this suit was decreed by the Deputy Collector, but on appeal by the defendants in that suit the Judge ordered the plaintiff to execute a *kabuliyat* to pay rent, and the rent has been paid since that time, 16th August, 1865. The plaintiff instituted this suit on the 8th August, 1877, for a declaration of his right as proprietor, free from liability to pay rent to the defendants, and to have the proceedings taken in 1864 and 1865 declared null and inoperative. The Courts below have decreed the claim. Defendants appeal on several grounds :—(i) that the decree of the Judge in 1865 is final; (ii) that the plaintiff is estopped from setting up a proprietary title; (iii) that the suit is barred by limitation; (iv) that plaintiff is in fact a tenant and liable to pay rent; (v) that he cannot succeed against defendants who are purchasers from those in whose favor the decree in 1865 was made.

The first plea fails. Although the plaintiff in 1864 brought a suit in the Revenue Court ostensibly under s. 14, Act X of 1859, he did not in fact come in acknowledging his tenancy and disputing liability to pay rent on any ground on which a suit could be maintained in the Revenue Court, but on the ground that he was a proprietor, and asking for his right to be established. Such a suit was not one which the Revenue Court was competent to entertain, and the decision in that suit cannot be held final on the question of the title now in litigation. Nor is the plea of estoppel valid. The plaintiff only submitted to what he considered to be a valid order of the Court, and there has been no renunciation of his right in favor of defendants, and nothing in his conduct towards defendants, or those whom defendants represent, which can estop him in this suit if brought within the term of limitation. All he did was to refrain from taking earlier steps to obtain his rights and this was done through ignorance of his rights. We are asked to apply the law of imitation in art. 118, Act IX of 1871, the Act applicable to this

suit; but we think the suit should be governed by art. 145. By s. 29, "at the determination of the period hereby limited to any person for instituting a suit for possession of any land, his right to such land shall be extinguished." The right may be enforced so long as the remedy by suit for possession is not barred, and the law of limitation for a suit for possession of immoveable property should govern the suit for the declaration or enforcement of the proprietary right, the latter being substantially a suit for possession in the fullest sense, i. e., holding and dealing with the property as owner. In this view the suit is not barred. Nor are we of opinion that arts. 14 and 15 apply, there being no decree or order which it was incumbent on plaintiff to have set aside within one year. The defendants as purchasers are in no better position to defend this suit than those from whom they purchased; the objection on this point therefore fails; and we are shown no grounds for interference in second appeal with the finding of the Courts on the question of title. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

GAURI SAHAI AND ANOTHER (PLAINTIFFS) v. RUKKO (DEFENDANT).*

Hindu Law—Mitakshara—Inheritance—Females.

According to Mitakshara Law none but females expressly named can inherit, and the widow of the paternal uncle of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case.

Munshi Hanuman Prasad, Pandit Bishambhar Nath, and Mir Zahur Husain, for the appellants.

Pandit Ajudhia Nath and Babu Jogindro Nath Chaudhri, for the respondent.

The order of remand of the High Court (PEARSON, J., and OLDFIELD, J.,) was made by

* First Appeal, No. 83 of 1879, from a decree of Maulvi Sami-ul-lah Khan, subordinate Judge of Moradabad, dated the 24th June, 1879.

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OLDFIELD, J.—This is a suit in respect of the right of inheritance to the property left by one Gulzari Mal. He died it is alleged six years before the suit was instituted, leaving him surviving a widow, Gaura, and mother, Parbati, both since deceased. The plaintiff Bhagwan Das is one of two sons of the sister of Gulzari Mal's father, and both sons are represented in this suit by Bhagwan Das and Gauri Sahai plaintiffs. The respondent in this appeal is Rukko, defendant, who lays claim to the property, and asserts that the house in suit was bought by her husband Ajudhia Prasad on the 14th June, 1849; that the shop was mortgaged to her; and that the cash claimed was a sum belonging to her husband; and she disputed plaintiffs' right, contending that she has a better right of inheritance, she being the widow of Gulzari Mal's paternal uncle. Other persons were also joined as defendants, namely, Sundar Lal, a minor represented by his guardian; he set up a title by adoption from Gulzari Mal; and Munna Lal and Chandra Sein; the former alleged that he was a brother of Gulzari Mal's father, and the latter called himself a nephew of the same.

The Subordinate Judge has found that the plaintiffs Bhagwan Das and his brother are the sister's sons of the father of Gulzari Mal, namely, Shib Sahai, and as such are among the heirs of Gulzari Mal, ranking as *bandhus*; he disallowed the relationship of the other defendants except Rukko, holding they do not prove their allegations so as to show they are among the heirs, but as between plaintiffs and Rukko, he holds that the latter is the nearest heir, and entitled to succeed in preference, and he bases this finding on a decision of the Bombay High Court in *Lallubhai Bapubhai v. Man-kurvarbai* (1) and a decision of this Court in *Bhugansee Daies v. Gopalji* (2).

The plaintiffs have appealed and we have only to do with the claim as between them and Rukko. In the absence of nearer heirs the plaintiffs being or representing the father's sister's sons of Gulzari Mal will succeed as *bandhus*; and the main question raised in this appeal is whether Rukko, being the widow of Ajudhia Prasad, Gulzari Mal's paternal uncle, is to be regarded as amongst the

(1) I. L. R., 2 Bom. 388. (2) S. D. A., N.-W. P., 1862, vol. i, 306.

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heirs and a nearer heir than the plaintiffs Bhagwan Das and his brother. An analogous question was decided in the judgment of the Bombay High Court (1) on which the Subordinate Judge relies. The plaintiffs in that case were on the extreme verge of *sapinda* relationship from the testator, and the question was whether the defendant, who was the widow of the first cousin of the testator on the paternal side, and therefore a much nearer *gotraja-sapinda* of the testator than plaintiffs, was entitled as such widow of a paternal first cousin to be regarded as a *gotraja-sapinda* of the testator, and if she be so did she stand next in rank to her husband Ganga Das. It was held that the widow was a *gotraja-sapinda* of her husband's first cousin, and took rank next after her husband among the heirs. The decision was based on the interpretation of the texts in the Mitakshara in respect of the succession of *gotraja-sapindas* being held to include females, and the admittedly received opinion of the Bengal and Madras schools, that female succession is confined to those females expressly named among the heirs, was not allowed to be the law of the Bombay Presidency. The learned Judges based their decision on the Mitakshara and Vyavahara Mayukha with advertence also to the customary law in the Bombay Presidency. It will be seen that precisely the same principles are in question in the case before us.

We think it, however, unnecessary to discuss the question so fully argued in the judgment of the Bombay Court whether the wife of a *gotraja-sapinda* is to be held under Mitakshara to be a *gotraja-sapinda*, as we are of opinion that, looking to the received interpretation of the law and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit. The Mitakshara is the law which governs this part of the country, but the commentary on it of Mitra Misra in Vira Mitrodaya is also of great weight and authority. Admittedly that author has interpreted the law to the effect that the admission of the widow and certain others depends on express texts while females generally are excluded from inheriting. At page 527, West and Bühler, 2nd ed., (translation of Vira Mitrodaya) is this passage: "But a daughter-in-law and the other (female relations) receive merely food and

(1) I. L. R., 2 Bom. 338.

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raiment, because their nearness (to her mother-in-law) as a Sapinda relation has no force, it being opposed by special texts. For the Veda (declares):—‘Therefore women have no right to use sacred texts or to a share,’ and Manu gives, in confirmity with that (passage), the following text:—‘Women have no right to use the sacred texts and no right to a share, they are (foul like) falsehood. That is a settled rule’. Besides the established doctrine of the Southern lawyers such as the author of the Smṛiti Chandrika, and of all the Eastern lawyers, of Jinutavahana and the rest, is, that those women only have a right to inherit whose claim has been particularly mentioned in special texts, such as:—‘The wife, and the daughters likewise, &c.’ but that (all) others are prohibited from receiving shares by the (above quoted) texts of the Veda and of Manu.” There is a note by West and Bühler objecting to the above passage on the ground that the author of Vira Mitrodaya has possibly misquoted the text of Manu, in which it is alleged the word “*adayaḥ*”, “have no right to a share”, is not to be found. There is also a passage in Vira Mitrodaya cited in the judgment of the Bombay Court (1) and to be found in West and Bühler, 2nd ed., p. 177, in which the author relies on a passage of Baudhāyana interpreting the Vedic text for the exclusion of females,—“A woman is not entitled to inherit; for thus says the Veda, females and persons deficient in an organ of sense (or a member) are deemed incompetent to inherit.”

It is contended that the proper translation of the Vedic text should be, “Women are considered disqualified to drink the *soma* juice, and receive no portion (of it at the sacrifice),” a translation given in West and Bühler, 2nd ed., p. 178. Referring, however, to the learned Judge’s judgment and the note in West and Bühler, 2nd ed., p. 178, Mitra Misra appears to have considered this alternative interpretation and to have rejected it, asserting that supposing that the word “*indriya*” in the original means *soma* juice, yet the word “*adāyādātva*” in itself is sufficient to imply a prohibition to inheritance of women. Whatever force the objections taken to the interpretation placed on the Vedic text by the author of Vira Mitrodaya may have, we consider that we are bound to accept as law the law of inheritance founded on that interpretation. The rule laid

(1) I. L. R., 2 Bom. 388.

down by the Judicial Committee of the Privy Council in *Thakoorain Sahiba v. Mohun Lall* (1) is one which should guide us here. Their Lordships observed with reference to a particular construction advanced by counsel: "Were the arguments in favour of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the *dicta* of received Treatises, by some novel interpretations of vague and often conflicting texts of the Hindu Commentators, would be most dangerous, inasmuch as it would unsettle existing titles." We have not only the view of the author of *Vira Mitrodaya*, but of *Smriti Chandrika*, ch. IV, pl. 4:—"Accordingly Bhaudhayana commencing with 'A woman is entitled' proceeds 'not to the heritage, for it is stated in *Cruti* that females and persons deficient in an organ of sense or member are deemed incompetent to inherit';" and in chap. XI, s. 1, pl. 56, the above prohibition is said to refer to "females other than *patni* and the like, whose competency to inherit has been expressly provided for."

We thus find that the disputed interpretation of the Vedic text has received the authority of the authors of *Vira Mitrodaya*, *Smriti Chandrika*, and others, and the principle of the general exclusion of females from inheritance has been affirmed by writers on Hindu Law—*Colo. Dig.*, bk. V., ch. VII., pl. 413, and pl. 434, note; 2 *Str. H. L.* 167; 2 *Macn. H. L.* pp. 82, 229; 1 *Macn. Princ. and Prec. H. L.* p. 26; *Mayne's H. L.* 449—and is admittedly accepted in Bengal and Madras; and we believe there can be no doubt that the customary law of this part of India excludes females not expressly named as heirs from inheritance and the course of decisions of our Courts has been generally in accordance with that rule. However, but few cases have been reported.

There is the case referred to by the Subordinate Judge—*Bhuganee Deice v. Gopalji* (2)—and noticed in the Bombay Court's decision. The decision in that case proceeded entirely on the *vyavastha* of the

(1) 11 *Moore's Ind. App.*, 386. (2) *S. D. A., N.-W. P.* 1862, vol. i, 306.

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law officer, and the case is meagrely reported and the precise grounds of the decision do not appear.

In another case decided by this Court not reported to which our notice has been drawn, one of two widows of the same husband was allowed to succeed to the *stridhan* of the other widow, on the ground that she was a *sapinda* of her husband's; that case, however, is not altogether in point.

On the other hand we find two decisions of the Sudder Dewany Adawlat, North-Western Provinces, to the effect that the Hindu Law does not recognise the widow of a brother of a deceased person to be one of his heirs,—*Soodeso v. Bisheyshur Singh* (1) and *Deo Koonwur v. Gumbheer Koonwur* (2)—and in another case—*Deenanath v. Sohnee* (3)—it was held that a niece in her own right or even in right of her son is not among the heirs of the last male owner of the property under Hindu Law. This decision appears to have proceeded on the ground that a female not expressly named among the heirs could not be classed among the *sapindas* or *samanodakas*. The above decisions were in cases governed by the Mitakshara.

The above are the only decisions by the Sudder Dewany Adawlat or High Court of these Provinces which have come to our notice.

In a case governed by the Mithila Law it was held by the Judicial Committee of the Privy Council that the childless widow of the deceased's elder brother has no right to succeed.—*Pudmavati v. Doolar Singh* (4).

In *Lala Jotse Lall v. Dooranee Koor* (5) the Calcutta Court decided that a step-mother cannot take by inheritance from her step-son: that was a ruling under the Mitakshara as the law prevalent in Mithila.

The same Court held in *Ram Dyal Deb v. Magnee* (6) that a sister cannot inherit as heir to her brother, and in *Radha*

(1) S. D. A., N.-W. P., 1864, vol. ii, p. 375.

(2) S. D. A., N.-W. P., 1864, vol. ii, p. 284.

(3) S. D. A., N.-W. P., Jan. to May, 1866, p. 65.

(4) 4 Moore's Ind. App., 259.

(5) W. R., Sp. N., 173.

(6) 1 W. R. 227.

Parsi Dossee v. Doorga Monsee Dossia (1) that a brother's son's daughters are not heirs according to Hindu Law; and in *Gunga Pershad Kur v. Shumbhoonath Burmun* (2) Mr. Justice Mitter remarks that the succession of females according to Hindu Law is quite exceptional and is not founded on the ordinary rule of spiritual benefit. On a full consideration of the question we are of opinion that the defendant is not among the heirs of the deceased Gulzari Mal. We remand the case in order that the Subordinate Judge may try the issue whether the property in suit forms the estate of Gulzari Mal or defendant-respondent is entitled to it in her own right or in that of her husband.

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Before Mr. Justice Pearson and Mr. Justice Straight.

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GOPAL (PLAINTIFF) v. UCHABAL AND OTHERS (DEFENDANTS).*

Suit for arrears of rent—Determination of Title—Res judicata—Act XVIII of 1873 (N.W. P. Rent Act), ss. 93, 95, 143—Act X of 1877 (Civil Procedure Code), s. 13.

The question whether the parties to a suit in a Court of Revenue for arrears of rent stand in the relation of landlord and tenant is one which it is necessary for such Court to try incidentally for the purpose of disposing of such suit, but not one which such Court has special jurisdiction to determine, and its determination of that question is not that of a competent Court. Consequently, where a Court of Revenue determines in such a suit, that the parties do not stand in such relation, such determination does not bar the party alleging that the parties do stand in such relation from suing in the Civil Court to establish such relation.

THE plaintiff in this claimed a declaration that certain land was his "hereditary holding" and was not the "cultivatory holding" of the defendant Uchabal, the suit being instituted in the Court of the Munsif of Jaunpur. He stated the following particulars regarding his claim: "The claim is that the land in suit is the hereditary holding in possession of the plaintiff: the defendants have cultivated the same as under-tenants for ten years: they do not hold the land by right of cultivation, nor have they any right in it: in the suit brought by the plaintiff against the defendants

* Second Appeal, No. 206 of 1880, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Jaunpur, dated the 1st December, 1879, affirming a decree of Pandit Soti Behari Lal, Munsif of Jaunpur, dated the 8th February, 1879.

(1) 5 W. R. 131.

(2) 22 W. R., 393.

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Uchabal, Ganga, and Matapallat for arrears of rent in the Revenue Court, those defendants had stated that the land in suit was their cultivatory holding and denied that they were the plaintiff's sub-tenants : the suit was consequently dismissed on the 28th September, 1877, without determination of the question of right, and the plaintiff was directed to seek his remedy in a competent Court: hence this suit is brought for establishment and declaration of the plaintiff's right to the hereditary cultivatory holding in dispute." The suit mentioned by the plaintiff in the particulars of his claim in the present suit was brought by him against the defendants Uchabal, Ganga, and Matapallat in the Revenue Court. In that suit he claimed rent for the land in respect of which he claimed in the present suit on the same ground as he claimed in the present suit, viz., on the ground that the land was his hereditary holding and the defendant Uchabal was his sub-tenant. The defendant Uchabal replied to that suit that he held the land directly from the landholder and not under the plaintiff. The defendant Ganga replied that he held a portion of such land under a mortgage from Uchabal. The Revenue Court which tried that suit held that the plaintiff had failed to prove that the defendants were his under-tenants or that he had let the land to them, adding that, if the plaintiff had any right as he claimed he might sue to establish it in the Civil Court. In the present suit the defendants Uchabal and Ganga set up similar defences; Uchabal stating that "the land in dispute was his holding, he being the original cultivator, that he paid rent to the landholder, and that he was not an under-tenant." The defendant Matapallat did not defend the previous suit: in the present suit he stated that he held a portion of the land in suit under a mortgage from the plaintiff's father. There were other defendants in the present suit who were not parties to the previous suit, but it is not material to state their defences.

With reference to the issue "whether the land in dispute was the hereditary cultivatory holding in possession of the plaintiff and the defendants are his sub-tenants, or whether it was the cultivatory holding of the defendant Uchabal and the defendant is not the sub-tenant of the plaintiff," the Munsif held that the plaintiff had failed to prove his case, and dismissed his suit. On appeal by the

plaintiff the Subordinate Judge of Jaunpur held, having regard to the decision in the previous suit, that the question whether the plaintiff was the hereditary cultivator of the land in suit and the defendant Uchabal his sub-tenant was a *res judicata*. The material portion of the Subordinate Judge's decision was as follows: "In the suit for arrears I think the Assistant Collector was fully competent to try the question as to whether the defendants were or were not under-tenants to the plaintiff who claimed the rent. In fact, without the determination of that question the suit could not go on. I also think that the Assistant Collector did decide that question against the plaintiff in as explicit terms as he could. His opinion, therefore, that the plaintiff could sue for that right again in a proper Court of justice could have no weight, and much less could it give this Court a right to entertain the suit again in the form now brought, *viz.*, to establish a cultivatory right in the land by setting aside the adverse title put forward by the defendants."

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The plaintiff appealed to the High Court impugning the decision of the Subordinate Judge on the ground that the respective rights of the parties had not been determined in the former suit; and that, assuming that such rights had been determined in that suit, the Revenue Court was not competent to determine them.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Oprakash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Court :

STRAIGHT, J.—This is a suit for a declaratory decree that certain lands are the hereditary cultivatory holding of the plaintiff. Both the lower Courts dismissed the suit, the Subordinate Judge being of opinion that it was barred by s. 13, Act X of 1877. The plaintiff now appeals, and the single point for consideration is whether the plea of "*res judicata*" should prevail.

In 1877 the appellant sued the three defendants, Uchabal, Ganga, and Matapallat in the Revenue Court for arrears of rent, alleging himself to be the hereditary cultivatory holder and that they were his sub-tenants. The defendant Uchabal pleaded that the whole of the land in respect of which rent was claimed was held

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by him in his own right, and that he had paid his rent for it to the zamindars, while Ganga defended his possession on the basis of a mortgage given to him by Uchabal. The Assistant Collector dismissed the suit on the 28th September, 1877, remarking that the plaintiff might, if he thought proper to do so, assert any rights to which he considered himself entitled in the Civil Court, and accordingly the present litigation was instituted on 17th September, 1878.

The appellant in substance contends before us that he is not barred by s. 13, Act X of 1877, as the Assistant Collector was incompetent to decide the question of right raised between the parties. The respondents on the other hand urge that, the plaintiff's claim in the Revenue Court being based upon an alleged hereditary cultivatory tenure, and the assertion that the defendants were his *shikmis*, the question of right was directly and substantially in issue before the Assistant Collector, who necessarily decided it in determining the case.

I am of opinion that the appellant's plea should prevail. No doubt the character in which the plaintiff came into Court was incidentally before the Assistant Collector, but the only real issue he had to adjudicate upon was whether any, and if so what, arrears of rent were due by the defendants. For it seems to me that the exceptional jurisdiction of the Revenue Court, in respect of suits and applications under ss. 93 and 95 of the Rent Act, is confined to those proceedings between parties in which the title or character of the litigants is not in question. An exception, however, may be found in s. 148 of the Rent Act, which deals with suits in which the right to receive rent is disputed, and provides that a third person who has received it may be joined as a party in the proceedings between the landholder and tenant: and it is to be remarked, in reference to this section, that though it empowers the Revenue Courts to determine the questions thus arising between the several persons, its decision shall not affect the right of either party entitled to the rent of such land to establish his title by suit in a Civil Court, if brought within one year. In his case in the Revenue Court the plaintiff-appellant practically asserted himself to be the landholder, in the sense that the defendants were his sub-

tenants and liable to pay him rent. The defendant Uchabal on his side disputed plaintiff's right to receive the rent, on the ground that he held directly from the zamindars and had paid it to them. The Assistant Collector does not appear to have availed himself of the provisions of s. 148, nor were the persons who had received the rent made parties to the proceedings. But it appears to me that the plaintiff should have the benefit of the reservation contained in the proviso to that section, and that he is entitled to bring his present suit.

Holding this view, I would decree the appeal with costs and remand the case under s. 562, Act X of 1877, for trial on the merits.

PEARSON, J.—I concur in the opinion that the present suit is not barred by the Assistant Collector's finding in the suit for arrears of rent, decided by him on the 28th September, 1877, that the plaintiff had failed to prove that the defendants were his under-tenants or that he had let the land to them. The question whether the parties stood in the relation of landlord and tenants was one which it was necessary for him to try incidentally for the purpose of disposing of the suit for arrears of rent, but not one which he had special jurisdiction to determine; and his determination of that question is not that of a competent Court.

The case must be remanded for trial on the merits as proposed by my honourable colleague.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Straight.

BACHEBI (DEFENDANT) v. MAKHAN LAL AND ANOTHER (PLAINTIFFS).*

Jains—Bindala Jains—Inheritance—Alienation by Widow—Hindu law—Mitakshara—Act X of 1865 (Succession Act), s. 331.

The term "Hindu" in s. 331 of Act X of 1865 means and includes a "Jain," and consequently in matters of succession, Jains are not governed by that Act.

The ordinary Hindu law of inheritance is to be applied to Jains in the absence of proof of custom or usage varying that law. The alienation by gift by the widow

* Second Appeal, No. 19 of 1880, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 24th September, 1879, affirming a decree of Maulvi Muhammad Said Khan, Munsif of Mainpuri, dated the 17th March, 1879.

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of a Bindala Jain of her husband's ancestral property is invalid according to the Mitakshara, which is the ordinary law governing Bindala Jains in the absence of custom to the contrary.

THIS was a suit instituted in the Court of the Munsif of Mainpuri in which the plaintiffs claimed, as the reversioners to the ancestral estate of one Hira Lal, to have a transfer by gift, bearing date the 2nd September, 1864, by his widow, the defendant Bachebi, of a portion of such estate, set aside, on the ground that, according to the customs and tenets of the Bindala Jains, a widow of that sect was not competent to alienate her husband's ancestral estate. The defence to the suit was that a widow of the sect of Bindala Jains was competent according to the customs and tenets of that sect to make such an alienation. The Munsif who originally tried the suit dismissed it for reasons which it is not material to state. On appeal the Subordinate Judge of Mainpuri reversed the decree of the Munsif and remanded the suit for re-trial, fixing as an issue for trial, amongst others, the issue : "Has the Bindala widow limited or unlimited power to alienate her ancestral immoveable property, and what are the conditions and circumstances under which such a widow is justified in making such an alienation." The Subordinate Judge, in remanding the suit, directed that a full inquiry should be made as to whether there was any valid custom on the question at issue among the Bindala Jains, or whether that sect was governed by the Hindu law in respect of such question. The Munsif who re-tried the suit held that the burden of proving that there was a valid custom having the force of law among the Bindala Jains under which a widow had an unlimited power to alienate her husband's ancestral estate lay on the defendants, and that they had failed to prove any such custom. The Munsif observed as follows in his decision :—"In sustaining the burden imposed on them by law they (defendants) have produced some documents and some oral evidence. But none of them prove that a widow is invested with such an unlimited power under any circumstances. In the first place the documents are not judicially proved by any kind of evidence in a manner that fulfils the requirements of the law. Secondly, some alienations were made by widows of the sect for the purpose of discharging ancestral debts, and in some instances with the consent of the reversioners, and in others they were in fact

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relaxations of the general rule to console the widow and to confer some spiritual benefit on her in the world to come, according to their notion. Such rare departures from the well-rooted and strongly-based principle and usage cannot be permitted to shake it in the least degree. Besides the alienations are of recent dates. The oral evidence produced by the defendants or procured by the Court at their instance consists mostly of persons other than Bindala Jains and therefore cannot be relied on. On the other hand the evidence produced by the plaintiffs is that of persons following the doctrines of the Bindala Jains. These persons un-animously say that a widow is not competent to make any kind of alienation of her ancestral estate under any circumstances. There were some witnesses summoned by the Court. All of them consistently established the doctrine that a widow of the Bindala sect of Jains has no power to alienate her ancestral property. No valid objection has been raised against this evidence by the defendants". The Munsif accordingly gave the plaintiffs a decree setting aside the gift in dispute. On appeal the District Judge affirmed the Munsif's decision, holding that "the defendants had failed to show that the usages of the Bindala Jains permit widows to make permanent alienations of property;" but modified the Munsif's decree, directing that the gift should be deemed valid for the lifetime of the widow, and invalid only so far as it purported to be permanent.

The defendant Bachebi appealed to the High Court, contending, *inter alia*, that the Hindu law of inheritance was not applicable to Jains, but the Indian Succession Act of 1865, and she was competent to make the alienation impugned by the plaintiffs.

Pandit *Ajudhia Nath* and *Babu Ratan Chand*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

OLDFIELD, J.—This is a suit to set aside a gift of certain ancestral property inherited from her husband made by Bachebi, a widow of the Bindala sect of Jains, on the ground that her act was illegal under Hindu law.

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The Courts below have decreed the claim. It has been contended in appeal before us that the Hindu law of inheritance does not govern the Jain community, and it was argued that in the matter of succession they would be governed by the Indian Succession Act. The contention cannot be allowed. The case before us is not one relating to intestate or testamentary succession, and no argument can be founded on that Act, since its application to Jains is in our opinion excluded by the terms of s. 331 of the Act, by which the provisions of the Act do not apply to intestate and testamentary succession to the property of Hindus, the word Hindu being used in its generic sense to include Jains. Moreover, it is now settled law that the ordinary Hindu law of inheritance is to be applied to Jains in the absence of proof of custom and usage varying that law. This was affirmed by the Privy Council in *Chotay Lal v. Chunno Lal* (1). Their Lordships say: "The customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof the ordinary law must prevail."

The ordinary law which will govern this case in the absence of custom to the contrary is the Mitakshara, and by that law the widow had no power to make the gift in question. Some evidence was produced with the object of showing that by custom prevalent among Bindala Jains a widow has absolute power over property inherited from her husband; but the lower Courts have held that the evidence does not establish any custom which can override the ordinary law, and in this respect we see no ground for interference.

In *Sheo Singh Rai v. Dakho* (2) it was observed that, among Jains of the Saraogi Agarwala sect, the sonless widow takes a very much larger dominion over the estate of her husband than is conceded by Hindu law; but that decision did not affirm any absolute right in the widow over ancestral property inherited from the husband, which is what we are concerned with in this case: and a custom established among one sect of Jains may not necessarily prevail among another, since the Jains are divided into numerous sects (*gachasor-gotras*), most of which do not eat together. We under-

(1) L. R., 6 Ind. Ap., 15.

(2) I. L. R., 1 All., 688.

stand that the Bindala sect with which this suit deals is small in numbers and confined to the districts of Mainpuri, Etah, and Farukhabad; and we may assume that the defendant has produced all the evidence of usage which is procurable, and that is clearly inadequate to establish the right claimed for the widow over ancestral property inherited from her husband.

Some of the cases of alienations by widows cited were with consent of relations or such as the Hindu law permits, and the oral evidence adduced is not evidence on which a Court could rely: some of the witnesses for the defendant are not of the same sect, whereas those of that sect produced by plaintiffs deny the existence of the customary right claimed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Straight.

MATA PRASAD (DEFENDANT) v. GAURI (PLAINTIFF)*

Suit of the nature cognizable in a Small Cause Court—Second appeal—Sale-proceeds—Act X of 1877 (Civil Procedure Code), s. 586.

A suit by one decree-holder against another for the money received by the latter on a division between them of the proceeds of an execution-sale as his share of such proceeds, under the order of the Court executing the decrees, is a suit of the nature cognizable in a Court of Small Causes, and consequently, where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit.

THE plaint in this suit stated that one Nandan hypothecated a house to the plaintiff on the 6th February, 1875, subsequently hypothecating the same house to the defendant; that on the 3rd October, 1877, the plaintiff obtained a decree against Nandan enforcing his lien on the house, in the execution of which the house was attached and proclaimed for sale; that the defendant had also caused the house to be attached in the execution of the decree held by him against Nandan; that the property was sold on the 21st January, 1878, for Rs. 115, in the execution of the plaintiff's decree; that the plaintiff was entitled to be paid the whole of the sale-proceeds,

* Second Appeal, No. 1238 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 24th June, 1879, affirming a decree of Shah Ahmad-ul-lah, Munsif of Gorakhpur, dated the 26th February, 1879.

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being a prior lien-holder, and the property having been sold in the execution of his decree; and that the Court executing the decrees, notwithstanding the plaintiff's preferential right to the sale-proceeds, made an order awarding Rs. 42-14-0 thereof to the defendant. The plaintiff thereof prayed "that Rs. 42-14-0 out of the sale-proceeds deposited in the Court which the defendant took contrary to his right be awarded to him, by establishment of his prior right and modification of the order of the 16th December, 1878." Both the lower Courts gave the plaintiff a decree.

On appeal by the defendant to the High Court it was objected on behalf of the plaintiff that a second appeal in the case would not lie, as the suit was one of the nature cognizable in a Court of Small Causes.

Lala Lalta Prasad, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—The plaintiff in this suit merely claims Rs. 42-8-0. It is true that in his plaint he also asks for the amendment of an order passed in the miscellaneous department on the subject of the distribution of sale-proceeds. But the prayer is superfluous; and all that is really meant is that the distribution made by that order may be nullified by the decree in this suit, not that that order should be altered. The suit thus appears to be of the nature of a Small Cause Court suit. Consequently this appeal is inadmissible and is dismissed with costs.

Appeal dismissed.

CRIMINAL JURISDICTION.

Before Mr. Justice Pearson.

EMPRESS OF INDIA v. KALLU AND ANOTHER.

Village-watchman—Act XLV of 1860 (Penal Code), s. 221—Act XVI of 1873 (N.-W. P. Village and Road Police Act), s. 8—Act X of 1872 (Criminal Procedure Code), s. 92.

A *chaukidar*, or village-watchman, is not legally bound as a public servant to apprehend a person accused of committing murder outside the village of which

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he is *chaukidar*, such person not being a proclaimed offender, and not having been found by him in the act of committing such murder, and consequently such *chaukidar*, if he refuses to apprehend such person on such charge at the instance of a private person, is not punishable under s. 221 of the Penal Code.

THIS was a case referred to the High Court for orders by Mr. S. M. Moens, Sessions Judge of Mirzapur, at the request of Mr. G. S. D. Dale, Magistrate of the Mirzapur District. The nature of the reference appears from the Sessions Judge's letter of reference, which was as follows: "I have the honor to forward herewith, by request of the Magistrate of the District, for orders of the High Court, a case decided by Mr. Macmillan, Superintendent of the Family Domains of the Raja of Benares. The defendants were charged with an offence under s. 221, Penal Code, in that they, being village-*chaukidars*, refused at the request of one Ashraf, a private person, to apprehend Bahadur on the charge of murder, whereby the said Bahadur escaped and has since evaded apprehension. Mr. Macmillan discharged the defendants on the ground that they were not legally bound as public servants to apprehend Bahadur; and s. 8 of Act XVI of 1873 bears out Mr. Macmillan's view, as the murder was not committed within the defendants' villages or beats, nor was Bahadur a proclaimed offender, nor did he commit the homicide in their presence. But Mr. Dale, the Magistrate, contends that village-*chaukidars* are police-officers, within the meaning of s. 92 of Act X of 1872. I cannot agree with him. The Code recognizes *chaukidars* under a distinct name, *viz.*, that of village-watchmen, in s. 90; and the whole tenor of Chapters IX and X shows that *chaukidars* were not intended to be included under the term police-officer,—(see ss. 93, 97, 99, 100, 110, 119, 126, 127). Further, *chaukidars* are distinctly discriminated from 'police' in s. 47 of the Police Act V of 1861, where also, as in Act X of 1872, s. 90, they are called 'village-watchmen'. Under the above circumstances I hold that Mr. Macmillan's view of the law was correct, and his order of discharge legal, and that the defendants could not properly be charged under s. 221 of the Penal Code".

The following order was made by the High Court:

PEARSON, J.—I concur with the Sessions Judge in considering Mr. Macmillan's view of the law to be correct.

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Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* GOBARDHAN DAS AND ANOTHER.

Prosecution for giving false evidence—Sanction—Act X of 1872 (Criminal Procedure Code), ss. 468, 471.

An instruction to the Magistrate of the District by the Court of Session, contained in the concluding sentence of its judgment in a case tried by it, to prosecute a person for giving false evidence before it in such case, does not amount to sanction to a prosecution of such person for such offence, within the meaning of s. 468 of Act X of 1872, that section supposing a complaint, or at least an application for sanction for a complaint.

Where a Court thinks that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468 or 469 of Act X of 1872, it should proceed under s. 471 of that Act.

Attention of the Court of Session in this case directed to *Queen v. Baijoo Lal* (1).

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of an order of Mr. H. G. Keene, Sessions Judge of Meerut, dated the 17th May, 1880, "sanctioning the prosecution of the petitioners for giving false evidence." It appeared that the petitioners had given evidence on the behalf of one Shimbhu Dial at his trial before the Sessions Judge for the forgery of a judicial record. The Sessions Judge convicted Shimbhu Dial of the offence charged against him, disbelieving the statements of the petitioners. The Sessions Judge concluded his decision in Shimbhu Dial's case, dated the 17th May, 1880, in these terms: "Let the Magistrate of the District be informed that the Court sanctions the prosecution of Gobardhan Das and Dwarka Prasad (petitioners) for false evidence."

The grounds of the application for revision were (i) that there was no evidence to show that the statements made by the petitioners were false, and the mere circumstance that the Judge disbelieved their evidence was not sufficient to warrant the inference that they had given false evidence; (ii) that the Judge had failed to comply with the provisions of s. 471 of Act X of 1872, not having made any preliminary inquiry, or recorded any proceeding showing that in his opinion an inquiry should be made; that the Judge's order should have specified the particular false statements

(1) I. L. R., 1 Calc., 450.

made by the petitioners; and that the Judge's reasons for disbelieving the evidence of the petitioners were highly conjectural, and it was beyond the scope and object of the law that prosecutions for giving false evidence should be allowed upon such grounds.

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Pandit *Nand Lal* and *Shah Asad Ali*, for the petitioners.

PEARSON, J.—The instruction given to the Magistrate in the concluding sentence of the judgment of the Sessions Court can scarcely be referred to s. 468 of the Criminal Procedure Code, which supposes a complaint, or at least an application for sanction for a complaint. S. 471 of the Code was doubtless the section under which the Sessions Court should have proceeded. But the provisions of that section have been altogether disregarded. The attention of the Sessions Judge is directed to the remarks of the learned Judges of the Calcutta High Court in the case of the *Queen v. Baijoo Lal* (1). In disposing of Shimbhu Nath's appeal, I have observed that there were no sufficient grounds for discrediting the evidence given by the petitioners on his behalf. I must, therefore, cancel the instruction and sanction given by the Judge to the Magistrate for their prosecution on a charge of giving false evidence, and direct that any proceedings which may have been instituted in pursuance thereof be immediately stayed and abandoned.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

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CHOTU (PLAINTIFF) v. JITAN AND OTHERS (DEFENDANTS).*

*Landholder and Tenant—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 148, 189—
Suit in which right to receive Rent is disputed—Determination of such Right—
Determination of proprietary right—Appeal.*

C sued J for the rent for certain land, alleging that he was the tenant of such land and J was his sub-tenant. J disputed C's right to receive rent for such land, alleging that he was not his sub-tenant, but S's, and had paid such rent to S. Under the provisions of s. 148 of Act XVIII of 1873, S was made a party to the suit. The

* Second Appeal, No. 1207 of 1879, from a decree of G. E. Knox, Esq., Judge of Benares, dated the 14th August, 1879, affirming a decree of W. F. Martin, Esq., Collector of Jaunpur, dated the 31st October, 1878, modifying a decree of Babu Dabi Prasad, Assistant Collector, dated the 25th July, 1878.

(1) I. L. R., 1 Cal., 450.

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Collector decided on appeal in the suit that *S* and not *C* was the tenant of such land, and *J* was her sub-tenant, and not *C's*, and had paid such rent to *S*. Held that there was no determination by the Collector of the title to such land but as incidental to the question who was entitled to receive the rent, and consequently the decision of the Collector was not appealable to the District Judge.

THE plaintiff in this suit sued the defendants Jitan and Bodhan for Rs. 20-11-0, being rent for land which he alleged was included in land held by him as a tenant at fixed rates, and was held by those defendants as his sub-tenants. The suit was instituted under s. 93 of Act XVIII of 1873 in the Court of an Assistant Collector of the second class. The defendants set up as a defence to the suit that the land for which rent was claimed was not included in the plaintiff's holding and held by them as his sub-tenants, but was the *sir*-land of one Sughra Bibi and held by them under her, and they had paid her the rent claimed.

Sughra Bibi intervened and supported the allegations of the defendants Jitan and Bodhan, and the Assistant Collector accordingly made her a defendant in the suit, with reference to s. 148 of Act XVIII of 1873. The Assistant Collector decided that, although the land was not included in the plaintiff's holding, but was the *sir*-land of the defendant Sughra Bibi, yet the plaintiff held it as a tenant, and the defendants as sub-tenants under him, and not as sub-tenants under the defendant Sughra Bibi, and gave the plaintiff a decree. On appeal by the defendant Sughra Bibi the Collector decided that the land was not held by the defendants Jitan and Bodhan as the plaintiff's sub-tenants, but as the sub-tenants of the defendant Sughra Bibi, and consequently dismissed the plaintiff's suit. On appeal by the plaintiff to the District Court, that Court held that an appeal did not lie to it, its reasons for so holding being as follows:—"According to the precedent *Syud Ghalib Ali v. Khilloo* (1) it is clear that the appeal now presented does not lie to this Court. The determination by the Collector of any proprietary right in the land is a determination without jurisdiction and no determination at all, and where there is no determination on the question of a proprietary title, no appeal lies to this Court."

(1) H. C. R., N.-W. P., 1871, p. 51.

On appeal by the plaintiff to the High Court it was contended on his behalf that the decree of the Collector was appealable to the District Court, the Collector having determined a question of title, whether he had jurisdiction to do so or not.

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Munshi Hanuman Prasad, for the appellant.

Lala Lalta Prasad and *Shah Asad Ali*, for the respondents.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following

JUDGMENT.—The plaintiff-appellant's suit in the Court of the Assistant Collector was disposed of in accordance with the provisions of s. 148 of the Rent Act, Sughra being joined as a party at the instance of the defendants. No question of proprietary title to land between parties making conflicting claims thereto was before either the Assistant Collector or the Collector for determination, for the plaintiff did not come into Court as a proprietor, but in the character of a cultivator claiming rent from his *shikmis*; and the simple point to be decided was whether any arrears were due to him or whether the zamindar had received and enjoyed the rent before and up to the time of the suit. Incidentally the Revenue Courts had to determine who was entitled to the rent of the land, but it was open to either party affected by their decisions to bring a suit in accordance with the proviso of s. 148 to establish his title in a Civil Court. Under these circumstances the Judge was clearly wrong in basing his decision on what he calls the determination by the Collector of a proprietary right in the land, such a determination being as he says without jurisdiction. No such determination of proprietary right was given by the Collector, but as incidental to the question "who was entitled to the rent" the Collector entertained and *pro tanto* decided so much of that question as was necessary for the purposes of the revenue suit. But the Collector did not decide, and could not have decided, in any final sense, such question of right, and therefore the reason assigned by the Judge for his order is altogether misleading. There is at the same time no appeal from the Collector to the Judge, seeing that the question before the former was simply

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one under s. 148 of the Rent Act XVIII of 1873. If a question of title had been raised before the Collector, the Judge under the proviso to that section of the Rent Act would clearly have had jurisdiction in the way of appeal to him, but the question he had to consider was simply that relating to the recovery of the rent, and the right or title to the land was merely entertained incidentally for the purpose by the Collector, from whose order there was no appeal to the Judge, and therefore none to this Court. The present appeal is therefore dismissed with costs.

Appeal dismissed.

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June 30.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

NATH PRASAD (PLAINTIFF) v. BAIJ NATH (DEPENDANT).*

Jurisdiction of the Civil and Revenue Courts—Act XVIII of 1873 (N.W.P. Rent Act), s. 93 (g)—Relations resembling contract—Act IX of 1872 (Contract Act), ss. 69, 70—Suit of the nature cognizable in Small Cause Court—Second appeal—Act X of 1877 (Civil Procedure Code), s. 586.

On the death of *K* a dispute arose among her heirs as to the succession to the share of a village of which she was the recorded proprietor. In January, 1874, *N*, who was not one of her heirs, and who was not a share-holder of such village, was recorded in the revenue register as lambardar in respect of her share, and was so recorded until February, 1878, when his name was expunged, and the name of *B*, who was one of the heirs, was recorded as the proprietor of such share. *N* subsequently sued *B* to recover Rs. 70-13-14, being the amount which he had paid on account of revenue in respect of such share during the period between January, 1874, and February, 1878, instituting such suit in a Civil Court (Munsif). *Held* that the suit was not one cognizable in a Revenue Court under s. 93 (g) of Act XVIII of 1873, but one cognizable in a Civil Court. *Held* also that the suit was one for damages under s. 70 of Act IX of 1872, within the meaning of s. 6 of Act XI of 1865, and accordingly of the nature cognizable in a Court of Small Causes, and no second appeal in the suit would lie.

THIS was a suit instituted in the Court of the Munsif of Bansaon in which the plaintiff claimed "Rs. 70-13-4, principal and interest, amount of revenue paid by him on account of the share of Kaula Kuari, deceased, in the village of Madanpur." The plain-

* Second Appeal, No. 1091 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 29th July, 1879, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansaon, dated the 25th April, 1879.

tiff stated the following particulars regarding his claim :—“ Kaula Kuari held a five-anna four-pie share in the village of Madanpur : she died childless, and on her death her heirs disputed the succession to her estate : in order to secure the payment of revenue, the plaintiff, a stranger, was recorded in the column of lambardars in respect of her share, under an order dated the 28th January, 1874 : from that time to the 6th February, 1878, the plaintiff, without being in possession, paid the revenue due from Kaula Kuari : on the 28th February, 1878, the defendant's name was recorded as her heir in the *khewat putidari* and revenue register, and the plaintiff's name was expunged: the defendant is now in possession of the share, and the plaintiff should recover from the defendant the revenue paid by him, together with interest.” It was stated by the defendant in defence of the suit that “the plaintiff had been in possession of the share of Kaula Kuari and had paid the revenue because he had been in possession, and that the defendant was only entitled to a one-fourth share of Kaula Kuari's share, and consequently the claim for the revenue of the whole share was unjust.”

The Munsif held that the defendant had failed to prove “by any document” that the plaintiff had been in possession of Kaula Kuari's share ; and that the plaintiff was entitled to recover from the defendant all he had paid, inasmuch as the defendant's name was recorded in respect of the whole of that share ; and gave the plaintiff a decree for the money claimed by him. On appeal by the defendant the District Judge held, with reference to s. 93 (g) of Act XVIII of 1873, that the suit was not cognizable in the Civil, but in the Revenue Courts, and set aside the Munsif's decree and dismissed the suit. The District Judge further decided as follows : “Then again, the plaintiff was put in possession because of disputes about the property, and hence he was answerable for all collections of rent, and should have shown how and to whom he rendered account, and he should have deducted his own payments for revenue and made over the balance to the rightful party on rendering possession to him. Moreover, defendant is not the proper party to sue, for his share since obtained is one-fourth only of the said property, and he did not get mesne profits for those very months and years but only possession after them.”

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On appeal by the plaintiff to the High Court it was contended that the suit was cognizable in the Civil Courts.

The Division Bench (STUART, C. J., and SPANKIE, J.), before which the appeal came referred to the Full Bench the questions stated in the order of reference, which was as follows :

STUART, C. J.—Two very important questions are raised in this appeal, and I propose to refer them for decision to the Full Bench of the Court. The first question is whether the jurisdiction for the case is the Civil or Revenue Court, and the second is whether, if the *forum* is the Civil Court, the case should be heard and determined by the Munsif, or by the Small Cause Court. The rulings on both questions, not only by this Court, but by the other High Courts, are not, as I view them, altogether consistent; and it would, I think, be very desirable to review and finally determine for ourselves the law on both the questions.

SPANKIE, J.—Assuming that the suit was cognizable by the Revenue Court, there was no appeal to the Judge, the claim being under Rs. 100 and there being no conflicting claims determined between the parties as to the proprietary title to land. But the Full Bench decision in *Ram Dial v. Gulab Singh* (1) seems in point, and according to that ruling the Munsif had jurisdiction, and therefore the Judge had in appeal, and I would hold his decree dismissing the suit to be correct. But I find that the Honorable Chief Justice wishes that the Full Bench decision referred to should be reconsidered, and I am quite willing that this should be done, as I dissented from it. Moreover, there is another question as to whether, if the Civil Court has jurisdiction, the Court in which the suit should be tried is not the Small Cause Court, and though I believe that we hold cases of contribution to be triable by the regular Civil Court, there are rulings which point to a difference. Besides the new Contract Act may have some bearing upon the question.

The Senior Government Pleader (Lala Juala Prasad), for the appellant.

Munshi Hanuman Prasad, for the respondent.

(1) I. L. R., 1 All., 26.

The following judgments were delivered by the Full Bench:

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STUART, U. J.—I substantially concur in the opinion which has been adopted by my colleagues in this reference.

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The two questions submitted to us are (i) whether the jurisdiction for the case is the Civil or the Revenue Court, and (ii) whether, if the Civil Court has the jurisdiction, such civil jurisdiction is that of the Munsif or of the Small Cause Court. It appears that, while a dispute among those claiming as heirs to the property in suit in consequence of Kaula Kuari having died childless and a dispute as to the succession to the property having arisen among the family, an arrangement was made with the plaintiff, a stranger, that his name should be entered in the register of lambardars, and that he should pay the revenue due from the property, and this he did from the 28th January, 1874, till the 6th February, 1878, that is, he paid the revenue leviable from the property for upwards of four years. The family dispute about the succession appears to have been brought to a termination, for on the 28th of the same month of February, 1878, the name of the defendant was entered as heir in the *khasat* and revenue register and that of the plaintiff expunged, and the defendant is now in possession. The plaintiff, who, as I have said, was a stranger and held no share in the village, has therefore brought this suit for recovery of the money so advanced by him, filing it in the Court of the Munsif. The Judge considers that in adopting this course he was mistaken, that the Munsif had not jurisdiction to entertain the case, and that he should have proceeded in the Revenue Court. In support of this view the Judge refers to s. 93 (g) of the Rent Act XVIII of 1873, but in this view of the law I cannot concur. The portion of s. 93 referred to applies only to "suits by lambardárs for arrears of Government revenue, payable through them by the co-sharers whom they represent, and for village-expenses and other dues for which the co-sharers may be responsible to the lambardárs." In the present case, however, the plaintiff was in no such position. He was not a share-holder in any sense, but a stranger whose name had been entered in the register of lambardárs for the mere purpose of meeting the Government revenue pending the dispute among the family to the succession to the property, and therefore s. 93 (g) has no application to

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him, and he cannot therefore be regarded as amenable to the jurisdiction of the Revenue Court. The plaintiff was therefore entitled to bring his suit in the Civil Court, and the Civil Court having jurisdiction, exclusive jurisdiction, is the Small Cause Court, this being a claim clearly within the meaning of s. 69 of the Contract Act. But being a suit of that nature there is under s. 586 of the Procedure Code no second appeal to this Court, and therefore the decision of the Judge cannot be interfered with by any form of appeal. But as such a result must cause gross injustice, the money being due and the opinion of the Judge on the question of jurisdiction obviously wrong, the plaintiff would be well advised, when the case comes on again before the referring Bench, to apply to this Court under s. 622 of the Procedure Code and for such remedy as can thus be afforded.

STRAIGHT, J. (PEARSON, J., and OLDFIELD, J., concurring)—The simple question for determination in this reference is whether the suit brought by the plaintiff-appellant was of the nature cognizable by a Court of Small Causes. If this be answered in the affirmative, then under the terms of s. 586 of Act X of 1877, no second appeal lies to this Court from the decision of the Zila Court. The following are the material facts: One Kaula Kuari had a five-anna four-pie share in the village of Madanpur. Upon her death disputes arose among her heirs, of whom the defendant-respondent was one, and thereupon the plaintiff, who was not a share-holder in the village, was on the 28th January, 1874, entered in the revenue records as *lambardár* of the share of the deceased and so continued until the 28th February, 1878, when the name of the respondent, as heir, was substituted. Between 1874 and 1878 the appellant had paid various sums for revenue due in respect of the five-anna four-pie share of the village of Madanpur, and it was to recover these amounts from the respondent that the present suit was brought on the 5th February, 1879. The Munsif decreed the claim, but on appeal his decision was reversed by the Judge, who held that cl. (g) of s. 93 of Act XVIII of 1873 applied, and that the appellant should have gone to the Revenue and not to the Civil Court. It may be remarked that, although he disposed of the case on the question of jurisdiction, the officiating Judge seems to have

entertained and dealt with the facts. In my opinion, he was wrong in holding that the suit fell within the description of the section of the Rent Act already adverted to. Between the appellant and the respondent the relations of lambardār and co-sharer in the proper sense of the term never existed. The former, a stranger to the village of Madanpur, was simply placed in vicarious charge of the share of the deceased, under what provision of the law is not very clear, until the right of inheritance should be determined, and though nominally he was designated lambardār, he cannot be said ever actually to have held towards the respondent the position contemplated by cl. (g), s. 93 of Act XVIII of 1873. Moreover, at the time he brought the suit his name had been expunged from the revenue record, and his temporary connection with the five-anna four-pie share of Kaula Kuari had terminated. It therefore appears to me that the officiating Judge was in error in holding the appellant's suit to be one for the Revenue Court.

But now comes the real and important question, was it of a nature cognizable by a Court of Small Causes, or in other words, does it fall within the terms of s. 6 of Act XI of 1865. No doubt there are many cases to be found in our reports in which it has been held that a suit for contribution cannot be brought in the Court of Small Causes, and a notable judgment by Sir Barnes Peacock in 1867 may be found in *Rumbux Chittangeo v. Madhoosoodun Paul Chaudhri* (1), though it is right to add that there is also one of the Madras High Court in 1870, *Govind Muneya Tiruyan v. Bapu* (2), which is directly adverse. I think, however, that neither of those important decisions should have any bearing or influence one way or other on the determination of the question before the Court. They were both of them delivered before the passing of Act IX of 1872, when legislation had not stepped in with plain language to give distinct vitality and effect to certain relations between parties out of whose moral obligations one to another a legal fiction had grown up for implying a contract, and while, as learned expositions of law, they may be read with interest and advantage, for practical purposes to the point under consideration they are obsolete and irrelevant. Chapter V of the Contract Act provides for "certain relations resembling those created by

(1) 7 W. R., 377. (2) 5 Mad. H. C. Rep., 200.

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contract," and ss. 69 and 70 seem specially framed to meet cases in which, while no contract can be said actually to exist (and to imply one would involve a resort to legal fiction), justice and equity require that a person, for whom an act has been done or money has been paid by another of which he enjoys the benefit, such other not intending to do the act or make the payment gratuitously, should re-imburse or compensate the person doing such act or making such payment. Consequently these two sections create a statutable duty, or in other words, turn a natural into a legal obligation in the person for whom the act has been done or the payment has been made towards the person doing such act and making such payment, and the latter may call upon the former to fulfil such duty and obligation, and if he fail to discharge it, he will be responsible in damages for the breach. In the present case the plaintiff paid the revenue for the defendants lawfully, that is, for a lawful purpose; he did not intend to do so gratuitously, and the defendant has adopted and enjoyed the benefit of the payments. The position of the parties, therefore, directly falls within the terms of s. 70 of the Contract Act. The plaintiff's suit accordingly was in reality one for damages, the measure of which will be the amount he has actually paid, and as such was of the nature cognizable by a Small Cause Court, the amount sought to be recovered being under Rs. 500; s. 586 of the Civil Procedure Code consequently applies, and no second appeal can be had from the decision of the officiating Judge to this Court.

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July 7.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAM SEVAK DAS (PLAINTIFF) v. RAGHUBAR RAI AND OTHERS
(DEFENDANTS).*

Hindu Law—Joint Hindu family—Alienation—Liability of the Joint undivided family property for family debts—Sale in Execution of Decree against one member of Family Property—Rights of other members.

During the minority of S, a member of a joint Hindu family consisting of himself, his father J, and his uncle H, and while he was living under the natural

* Second Appeal, No. 257 of 1880, from a decree of Rai Bhagwan Prasad, Sub-ordinate Judge of Azamgarh, dated the 16th December, 1879, affirming a decree of Maulvi Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 11th October, 1879.

guardianship of his father, *R* sued *J* and *H*, but not *S*, as the heirs of *P*, *S*'s grandfather, and as the heads and representatives of the joint family, to recover a joint family debt incurred to *R* by *P*, before *S*'s birth, by the sale of the joint family estate which had been hypothecated by *P* as security for the payment of such debt. *R* obtained a decree in this suit against *J* and *H* for such debt, such decree directing the sale of the joint family estate for the satisfaction of the debt. In the execution of such decree the rights and interests of *J* and *H* in such estate were put up for sale and were purchased by *R*, who took possession of such estate. Held, in a suit by *S* to recover his share of the joint family estate, that, under the circumstances, it must be held that the decree against *J* and *H* was made against them as representing the joint family, and therefore such decree was properly executable against such estate, notwithstanding that *S* was not formally brought on the record of the suit in which such decree was made, and *S* could not recover his share of such estate. *Bissessur Lail Sahoo v. Luchmessur Singh* (1) followed: *Deendyal Lal v. Jugdeep Narain Singh* (2) distinguished.

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The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Spankie*, for the appellant.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The plaintiff's grandfather Pragash Rai borrowed a sum of money from the defendants No. 3, 4, and 5, respondents before us, by deed dated 11th September, 1865, before the birth of plaintiff, and mortgaged certain ancestral property as security for the loan. In 1875, when plaintiff was a minor living under the natural guardianship of his father Jasram Rai, the respondents above mentioned brought a suit against Jasram Rai and his brother Harsukh Rai, as heirs of Pragash Rai, for the recovery of the money lent by sale of the property mortgaged, and obtained a decree on 21st November, 1875; and they executed their decree by attaching and selling the mortgaged property, and became the purchasers on the 20th March, 1876, and obtained possession of the property. The plaintiff has brought the present suit to recover his share of the property on the ground that the sale cannot affect more than Jasram Rai's and Harsukh Rai's

(1) L. R., 6 Ind. App., 233.

(2) I. L. R., 3 Calc., 198.

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interests. The Courts below have dismissed the suit, and we find no reason to interfere.

The money for recovery of which the respondents' suit was brought was borrowed by plaintiff's grandfather before plaintiff's birth for the purpose of releasing from liability to sale certain ancestral family property; the debt was therefore clearly a debt which plaintiff is bound to pay, and for which the ancestral property is liable, and we cannot allow the contention raised that, looking at the proceedings taken by the respondents in the suit they brought in 1875 against Harsukh Rai and Jasram Rai, and the decree obtained by them, and the sale-proceedings, the respondents bought only the interests of Jasram Rai and Harsukh Rai. It may be that plaintiff was not formally brought on the record of that case as a defendant under the guardianship of his father, but at the time he was a minor, necessarily under the guardianship of his father, who was admittedly the head of a joint Hindu family, and the suit was brought against his father and his uncle as the heirs of Pragash Rai. It is presumable that the heirs were sued as heads and representatives of the joint family, and indeed there is no reason to doubt the fact, and the suit was brought ostensibly and in fact to recover a debt for which the family was liable, and the relief sought was to recover the debt by sale of the ancestral property mortgaged, and the decree was made for the sale of the property. Under these circumstances, it must be held that the decree was passed against Jasram Rai and Harsukh Rai as representing the joint family in respect of a joint debt of the family, and was properly executable against the joint ancestral property, and the plaintiff cannot recover the property sold in execution. In thus deciding this case we consider we are doing no more than giving effect to the principle laid down in *Bisessur Lall Sahoo v. Luchmessur Singh* (1). Two decrees had been obtained against a member of a joint Hindu family as heir of his grandfather to recover a debt for which the joint family was liable, and the question was whether the entire family property, which had been sold in execution, was liable under the decrees passed against the judgment-debtor only. It was held to be liable. Their Lord-

(1) I. L. R., 6 Ind. App., 233.

ships held that, the family being joint, it was to be presumed that the suit was brought against the member of the family as representing the family; and they observed, looking to the substance of the cases and the decrees, "they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property;" and they add: "The Court will look at the substance of the transaction in execution proceedings, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right."

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The case of *Deendyal Lal v. Jugdeep Narain Singh* (1) has been cited as an authority for an opposite view to the one we take. But the facts of that case may not be similar; it is not clear, for instance, from the report of that case whether the decree in the suit had been passed against property other than that which it was sought to sell in execution, and the auction-purchase~~r~~ appears not to have been considered a *bona fide* purchaser for value under the circumstances. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

BEHARI BHAGAT (DEFENDANT) v. BEGAM BIBI AND OTHERS (PLAINTIFFS).*

1880
July 19.

Appeal—Act X of 1877 (Civil Procedure Code), s. 540.

The plaintiffs, the widow and son respectively of *N*, deceased, claimed immoveable property inherited from his father by *N*, and also immoveable property which had devolved upon *N* from his brother, who had predeceased him, and mesne profits of such properties. The Court of first instance, finding that the claim to the former property was admitted, and that to the latter was not denied, but resisted as barred by s. 13 of Act X of 1877, and holding it not to be so barred, made a decree returning the plaint to the plaintiffs that they might after correcting it file it either in the Revenue Court in regard to the profits of the former property, or in the Civil Court for possession of the latter property. Held that, although the claim of the plaintiffs was not either decreed or dismissed, yet as the right and title asserted by them to such properties was implicitly recognised by such decree, the defendants were entitled to appeal from it.

* First Appeal, No. 15 of 1880, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Gházipur, dated the 16th July, 1879.

(1) I. L. R., 3 Calc., 198.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and *Lala Lalta Prasad*, for the appellant.

Pandit *Bishambhar Nath* and *Shah Asad Ali*, for the respondents.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.,) so far as it is material, was as follows :

PEARSON, J.—The suit is for proprietary possession of certain shares in certain maháls and of some sîr-lands, and for mesne profits of the shares and damages in respect of the sîr-lands from 1283 fasli. The plaintiffs claim the share inherited from his father by Niamat Ali, the deceased husband of the female and father of the male plaintiff, and also a share which had devolved upon Niamat Ali from his brother Torab Ali who predeceased him. The lower Court, finding that the claim to Niamat Ali's original share was admitted, and that to the share derived from Torab Ali was not denied, but resisted as barred by s. 13, Act X of 1877, and holding it not to be so barred, thought it proper to "return the plaint to the plaintiff that she may after correcting it file it either in the Revenue Court in regard to the profits of the share owned by her in her own right, or in the Civil Court only for possession of the residuary share and its mesne profits."

The anomalous nature of the lower Court's final order has raised a question as to the admissibility of the appeal preferred here by the defendant. It was contended by the respondents' pleader that the appellant was not injured by the decree and had no right to appeal from it. The claim of the plaintiffs is not indeed either decreed or dismissed in terms ; but in effect the right and title asserted by them. to the shares which form the subject of their claim is implicitly recognized as entitling them to sue by an amended plaint for profits or possession in the Revenue or the Civil Court. This being so, we cannot say that the present appeal is inadmissible, and we proceed to dispose of it.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1880
July 20.

IKBAL BEGAM (DEFENDANT) v. GOBIND PRASAD (PLAINTIFF)*

Vendor and purchaser—Contract of Sale.

The vendor of certain immoveable property agreed to sell such property and the purchaser agreed to purchase it on the understanding that the purchaser should retain a part of the purchase-money and therewith discharge certain bond-debts due by the vendor for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. *Held*, in a suit by the purchaser for the possession of such property in virtue of such conveyance, that, the purchaser not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed and the suit was therefore not maintainable.

THE plaintiff in this suit claimed possession of a village called Pheri in virtue of a deed of sale executed in his favor by the defendant on the 29th June, 1876, and registered on the 25th August, 1876. This deed declared that out of the purchase-money, Rs. 16,000, Rs. 14,000 remained with the plaintiff to be paid in satisfaction of three bonds dated severally the 15th August, 1868, the 14th October, 1869, and the 15th April, 1871, in which the property conveyed was hypothecated, and that the defendant had received Rs. 2,000 in cash. In his plaint the plaintiff alleged as follows: "In part payment of the consideration-money Rs. 900 was paid to the vendor after the execution of the sale-deed and before its registration, and Rs. 1,100 was paid to the vendor subsequent to registration: thus the defendant-vendor received in part of the purchase-money Rs. 2,000 in cash, and the vendor left with the plaintiff-vendee Rs. 14,000 for liquidation of debts for which the said village together with other property stood pledged: in this way the vendor received the whole of the purchase-money, and a detail of the payment of the consideration-money, as well as of the debts to the payment of which Rs. 14,000 were credited, is given below: the defendant-vendor, on receipt of Rs. 1,100, made over the sale-deed to the plaintiff and put him in proprietary possession of the village: he remained in possession of the village for a few months and collected rent from the tenants, paid the revenue-instalments to the

* First Appeal, No. 64 of 1879, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 31st March, 1879.

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Government, and sold the *dhak* and *beri* produce in the said village: the defendant visited the said village in March, 1877, and forcibly dispossessed the plaintiff therefrom, and on the 9th April, 1877, she stated in the case of mutation of names that she had not given possession to the plaintiff: accordingly the Assistant Collector, on this very ground, on the said date, refused to effect mutation of names in the plaintiff's favor, and his decision was affirmed on appeal on the 9th June, 1877: this is the cause of action which the plaintiff has against the defendant."

The defendant stated in her written statement that she had only consented to sell the property in suit "for the purpose of liquidating the bond-debts mentioned in the sale-deed, for preventing the accumulation of interest on the said debts, and for freeing herself from liabilities", and that the plaintiff had agreed to pay the bond-debts and to cause the bonds to be returned to her, but had failed to carry out his agreement. She further stated as follows:—"Consequently the sale transaction remained incomplete, and it was on this very account that the defendant neither gave possession of the property to the plaintiff, nor obtained mutation of names; now the plaintiff, who having fraudulently caused the sale-deed to be executed by the defendant's agent took it, and for whose fault and breach of promise the sale was not concluded and completed, is not competent, in point of justice and according to law, to claim possession of the property in suit in virtue of the said sale: granting that the sale-transaction has not become void, still until the plaintiff causes the bonds to be returned, he cannot, in point of justice, be entitled to the possession of the disputed property yielding an annual income of more than Rs. 700 by paying only Rs. 2,000: the plaintiff's dishonest motive, his fraudulent practice, and his breach of promise are evident from the circumstance that, even up to this time, he has not expressed his readiness to pay off the debts, to cause the said bonds to be returned, and to free the defendant from the said debts."

The Court of first instance gave the plaintiff a decree for the possession of the property, the material portion of its decision being as follows: "Leaving out of consideration the particulars of the transaction of Rs. 14,000, the Court is of opinion that, as the sale-

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deed was executed, and registration also completed, and Rs. 2,000 out of the purchase-money was also received, the sale-transaction was undoubtedly complete. Even if Rs. 14,000 be held not to have been paid, still that cannot affect the completion or validity of the sale-transaction. The defendant is not competent to ignore the sale or declare it to be null, supposing there was any such condition as is alleged by the defendant (the existence of which is not proved), and in consequence of its non-fulfilment the defendant suffered a loss, having had to pay interest on the money she was not bound to pay; in that case the defendant should have instituted a suit for damages or one of some other kind, as she thought proper. The sale-transaction, which was altogether conclusive, cannot be objected to by her. Therefore, the Court is of opinion that the sale-transaction was valid and had become conclusive. The defendant's objections against it are not proved and are wrong. The plaintiff's statement in respect of possession and his subsequent dispossession is in the opinion of the Court untrue. The plaintiff is not proved to have held possession. But this creates no defect which could bar the plaintiff's claim for possession being decreed".

The defendant appealed to the High Court, the principal grounds of appeal being (i) that the plaintiff, having by means of a proviso which he did not mean to perform, induced the defendant to execute the deed of sale, had been guilty of fraud, and was not entitled to any relief; and (ii) that the plaintiff, having failed to perform his part of the contract of sale, was not entitled to a decree under that contract, and his suit should have been dismissed.

Mr. Conlan and Mir Zahur Husain, for the appellant.

Munshi Hanuman Prasad, for the respondent.

The judgment of the High Court (STUART, C. J., and STRAIGHT, J.), so far as it related to the above contention, was as follows:

JUDGMENT.—This is a first appeal in which the defendant-appellant complains of the judgment of the Subordinate Judge of Moradabad, by which that officer allowed the plaintiff's claim under a sale-deed, dated 29th June, 1876, and registered on the 25th August, 1876, on the ground of the plaintiff's failure to perform his part of

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the contract, that the sale-transaction is therefore incomplete, and that the plaintiff was not entitled to the possession of the property which he claims.

As the appellant desires our judgment on the merits of the case, the first two reasons of appeal disputing the legality of the registration of the deed of sale are not pressed by his counsel, and it is unnecessary for us therefore to express our opinion on the validity or otherwise of the registration that was made.....
.....On the merits we are clearly of opinion that the defendant's contention is right and that this appeal must be allowed. The views of the Subordinate Judge on the transaction between the plaintiff and defendant are entirely conjectural, and are not only inconsistent with the admitted facts which led to the contract of sale, but are positively disproved by the evidence. The consideration in the sale-deed was Rs. 16,000, Rs. 2,000 of which was paid in cash, and the remaining Rs. 14,000 were to be applied by the plaintiff towards the payment and discharge of three bonds dated respectively 15th August, 1868, 14th October, 1869, and 15th April, 1871. If this engagement had been fulfilled by the plaintiff, it would have been his duty to have returned the discharged bonds to the defendant; but this he has not done, nor has he paid the bond-debts, or done anything to account for the Rs. 14,000 in the manner provided by the sale-deed. In fact the plaintiff himself does not even allege in his plaint that he has applied the Rs. 14,000 in this manner, while one of his own witnesses, one Assad Ali, a mukhtar, makes a statement in his deposition which may explain the plaintiff's failure to apply the Rs. 14,000 as stipulated in the sale-deed. This witness says that he had learnt that there was money due by the plaintiff to Sheo Prasad (since deceased), and he had learnt this from Debi Dial, Sheo Prasad's son, and he adds that he had learnt this fact before as well as after the execution of the deed by the defendant to the plaintiff. He then goes on to say:—"In my opinion the nature of the account was this, that Gobind Prasad was imprisoned by the Nawab of Rampur for default of payment of revenue, and Sheo Prasad had paid that amount, and Gobind Prasad had promised that he would give credit for that amount in the account of the joint bonds, and this was the account which could not be adjusted." In other

words, the plaintiff had used the defendant's bonds for his own benefit on account of his indebtedness to Sheo Prasad, and afterwards to Debi Dial, and not as he had arranged with the defendant. The contract between the plaintiff and defendant was therefore incomplete, and indeed merely inchoate, and the property, possession of which he claims, did not pass to him. On this subject our attention was directed to Sugden's Vendors and Purchasers, 14th ed., p 241, where it is laid down that "a purchaser cannot maintain an action for breach of contract without having tendered a conveyance, and the purchase-money;" which appears directly in point in the present case; for here, although there was an intended contract and the execution of a conveyance or sale-deed, there has been a manifest withholding of the purchase-money, and therefore the plaintiff cannot maintain his suit. The Subordinate Judge has taken an entirely erroneous view of the case, and we must reverse his judgment and decree, and allow the present appeal with costs in both Courts.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

MUHAMMAD ABU JAFAR (PLAINTIFF) v. WALI MUHAMMAD AND OTHERS
(DEFENDANTS.)*

*Jurisdiction of Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act),
s. 10, 33, 39, 95—Ejectment of Tenant—Determination of nature and class of
tenancy—Determination of title—Res judicata.*

A suit for a declaration that the defendant holds an estate paying revenue to Government as a manager subject to ejectment at will, and not under a perpetual lease at a fixed rate of rent, and for the defendant's ejectment, is one cognizable by the Civil Courts.

In such a suit, if the relationship of landholder and tenant between the parties be established, then the Revenue Court only can make an order for the defendant's ejectment, or for determining the nature and class of his tenure, that is to say, whether he is a tenant at fixed rates within the meaning of s. 4 of Act XVIII of 1873, or an ex-proprietary tenant, or an occupancy-tenant, or a tenant without a right of occupancy.

The question of title raised in such a suit is not concluded by the orders of the Revenue Courts establishing the relationship of landlord and tenant between

* Second Appeal, No. 1183 of 1879, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 9th September, 1879, reversing a decree of Maulvi Kasim-ud-din Ahmad, Munsif of Azamgarh, dated the 11th June, 1879.

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the parties, on an application having been made by the defendant under s. 39 of Act XVIII of 1873, upon a notice having been served upon him by the plaintiff under s. 36 of that Act, objecting to his ejection.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case to the lower appellate Court.

Munshi Kashi Prasad, for the appellant.

Pandit Bishambhar Nath, *Babu Oprokash Chandur Mukarji*, and *Mir Akbar Husain*, for the respondents.

The High Court (OLDFIELD, J., and STRAIGHT, J.,) made the following order of remand:

OLDFIELD, J.—The plaintiff avers that he holds by purchase a two-anna share out of eight annas in mauza Damri Makhdumpur, and that the defendants, who are in possession of the eight annas share, hold the same as managers for the proprietors, paying to the latter the profits, but with liability to be ejected at will; and the plaintiff seeks to have it declared that defendants have no sort of proprietary right such as it is alleged they have set up; and he asks that they may be ejected from the two-anna share belonging to plaintiff, and he also seeks to recover mesne profits. The material answer made by the defendants is that they are not managers on behalf of plaintiff or the zamindars, but have ever since the fifth settlement, or ninety-three years ago, held the property on a perpetual lease under a "*mushakhasidari*" pattah, or lease, on payment of a fixed rent, and are not liable to be ejected; that the plaintiff has already taken proceedings in the Revenue Court to eject them under s. 36, Act XVIII of 1873, without success; and that the order then passed is final and conclusive; and that the Civil Court cannot take cognizance of this suit with reference to the provisions of ss. 96, 197, and 199 of Act XVIII of 1873. There was a plea also that the sale-deed by which the former zamindars conveyed to plaintiff a two-anna share expressly reserved the defendants' rights. The Court of first instance held that the defendants had not proved any such tenure as they assert: on the contrary, the evidence shows that they held the property under different tenures at different times, paying varied sums by way of rent; that it had been held

in mortgage from 1215 to 1227 fasli, and from 1228 to 1231 fasli had been held in mortgage by Jammu defendants' ancestor, after which the same person held it under a simple lease from 1234 to 1238 fasli at Rs. 215, and subsequently there was a lease to one Chedan from 1240 to 1244 fasli. The Court also considered the order in the settlement department conclusive against any such right as defendants now set up, and the suit was decreed.

The defendants now before us appealed to the Judge, urging similar grounds as those taken in the Court of first instance. The Judge has dismissed the suit on the ground that the plaintiff can maintain no suit for a declaration of his right, since the orders in the revenue department in the proceedings taken under s. 36, Act XVIII of 1873, are conclusive on the question of the relative position of the parties, and that position having been held to be one of landlord and tenant, the further claim for ejectment cannot be maintained.

The decision of the Judge cannot be upheld. The claim, as it will be seen from the mention of it already given, is for a declaration that defendants held the share as managers only liable to ejectment at will, and are not in the position they set up of holders under any sort of perpetual lease at fixed rates of rent. The question is obviously a matter peculiarly within the jurisdiction of a Civil Court to determine. S. 95, Act XVIII of 1873, enacts that no Courts other than Courts of Revenue shall take cognizance of any dispute or matter on which any application of the nature mentioned in that section might be made; and amongst them are applications to determine the nature and class of a tenant's tenure under s. 10, and applications to eject a tenant under ss. 35 and 36. But this law cannot apply to this suit as brought, where no tenancy on the part of the defendants is really admitted, and where relief is sought against an alleged assertion by defendants of a proprietary right. There is nothing therefore in the Rent Act to prevent a Civil Court from determining what is the actual status of the parties. If a tenancy be established, then of course it is only the Revenue Court that can make any order either for ejectment or for determining the nature and class of the tenant's tenure under s. 10, that is, whether he is

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a tenant at fixed rates (i. e., within the meaning of s. 4), or an proprietary tenant, or an occupancy-tenant, or a tenant without a right of occupancy; but any question as to the terms on which a tenant may be holding, not properly coming within the provisions of s. 10, would not be one exclusively within a Revenue Court's cognizance. Looking therefore to the claim and the relief sought for a declaration of right, there is nothing to prevent a Civil Court determining it. Nor do the proceedings already taken in the Settlement Court and the Revenue Court bar the Judge from deciding the question of title raised. It appears that in 1873 the present plaintiff applied to the Settlement Officer to have defendants' names expunged from the registers as perpetual lessees, and an order was passed that they were not holding under a perpetual lease, and that their rent was not of a fixed character. This order cannot affect this suit. The proceedings in the Revenue Court were commenced on an application made by defendants under s. 39, Act XVIII of 1873, (on whom plaintiff appears to have served a notice under s. 36), objecting to plaintiff's ejecting them. The Assistant Collector held defendants were mere tenants-at-will since 1837, and liable to be ejected. The Commissioner on the other hand held they were not tenants at all within the meaning of s. 36, as they did not pay rent; and on final appeal to the Board it was held that they were tenants with rights of occupancy and not liable to be ejected under s. 36. But the orders passed in these proceedings are not final on the question of title raised in the suit before us. This point has been already determined by the Full Bench of this Court in *Shimbhu Narain Singh v. Bachcha* (1).

The Judge must decide the issue as to the position of the defendants whether they are merely managers of the property without possession of any proprietary or tenancy right and as such are liable to be ejected, or whether they are lessees holding under a lease in perpetuity at a fixed rent. The case is remanded for trial of this issue and ten days will be allowed on submission of the finding for objections.

Cause remanded.

(1) I. L. R., 2 All., 200.

FULL BENCH.

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July 28.

Before Sir Robert Stuart, Kt, Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

RAJ BAHADUR (PLAINTIFF) v. BIRMHA SINGH (DEFENDANT).*

Jurisdiction of Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 44, 93—Landholder and Tenant—Res judicata—Improvements by Tenant—Well.

A suit in which the matter in dispute is whether a landholder is entitled to demolish a well constructed by a tenant is not one cognizable in the Revenue Courts but in the Civil Courts.

The decision of a Revenue Court, in a suit by a landholder against a tenant under s. 93 (b) of Act XVIII of 1873 for the ejectment of the tenant on the ground of misconduct in constructing a well, that the tenant could not be ejected from his holding without compensation being given to him for his outlay in constructing it, is not a determination of the landholder's right to demolish the well as having been constructed by a person not having a right to construct it, and consequently such a decision is not a bar to a suit by the landholder in the Civil Court for the demolition of the well as having been so constructed.

S. 44 of Act XVIII of 1873 implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and therefore, where a well constructed by a tenant benefits the land held by him, a suit by the landholder in the Civil Court for its demolition as having been made without his consent is not maintainable.

THE plaintiff, a landholder, instituted the present suit against the defendant, his tenant, in the Court of the Munsif of Fatehpur, on the 4th July, 1878, claiming that the defendant might be restrained from constructing a well upon the land occupied by him; that the materials for constructing the well might be removed from the land, and the land restored to its former condition; and that Rs. 10 might be awarded to him as compensation; claiming on the ground that the defendant was wrongfully constructing the well without his consent. The defendant set up as a defence to the suit that the well had been actually constructed before the suit was brought, and for that reason should be allowed to remain; that the well had been constructed with the consent of the plaintiff's agent, and the land was not injured by its

* Second Appeal, No. 211 of 1880, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 11th December, 1879, affirming a decree of Pandit Kaashi Narain, Munsif of Fatehpur, dated the 4th September, 1878.

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construction but was benefited and improved thereby; and that the suit was not cognizable in the Civil Courts but in the Revenue Courts. It appeared that the plaintiff had formerly applied to the Revenue Court, under s. 93 of Act XVIII of 1873, for the ejectment of the defendant on the ground that he had committed a breach of the conditions of his tenancy in building the well without the plaintiff's consent. This application was refused by the Revenue Court on the 6th June, 1878, on the ground that the defendant had improved the land by the construction of the well, and under s. 44 of Act XVIII of 1873 could not be ejected without payment of compensation. The Munsif held that the present suit was cognizable in the Civil Courts, and dismissed it for reasons which it is not material to state. On appeal by the plaintiff the District Judge affirmed the decree of the Munsif on the ground, amongst others, that the matter in dispute was *res judicata*, with reference to the decision of the Revenue Court of the 6th June, 1878. The material portion of the District Judge's decision was as follows: "The case is really the same as that already disposed of by the Revenue Court. The present suit does not seek to set aside that order, and the order being passed by a Court competent to do so, must be held to be binding to the effect that defendant cannot be dispossessed, and the well dug by him must be considered to be a work effected for the improvement of the land in his possession. What plaintiff fears is that he will have to pay compensation in a larger amount than is agreeable to him, before he can turn his tenant out. Defendant is shown to be a tenant with rights of occupancy in respect of the land on which the well is built. He had proceeded to dig to some depth into the ground and had incurred an outlay of more than Rs. 59, as reported by the peshkar of the tahsil in the revenue suit, before his landlord tried to stop him in his act. If any tenant has the power to dig a well for the improvement of his cultivation, as I conceive he has by the text of s. 44, Act XVIII of 1873, and to receive compensation therefor before he can be evicted, it stands to reason the landlord is barred relief in the form now put, in his suing to have the well dug up and destroyed. He or his agent should have taken earlier measures by way of an injunction to stop the construction of the well before his tenant had incurred much time and outlay upon it.

The permission of the agent is said to have been given to the tenant, and though this is denied by both the landlord and his agent, they must stand by their own *laches* in not representing the cause sooner. He has his remedy against his tenant, by enhancing his rent for the land improved. I decline to interfere, and dismiss the appeal with costs."

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On appeal by the plaintiff to the High Court it was contended on his behalf that the matter in dispute was not *res judicata*, and that, unless the defendant proved that he had constructed the well with the plaintiff's consent, he was liable to the plaintiff's claim. The Division Bench (PEARSON, J., and OLDFIELD, J.,) before which the appeal came, on the 13th June, 1880, referred it to the Full Bench for disposal.

Munshi *Hanuman Prasad*, for the appellant.

The Senior Government Pleader (*Lala Juula Prasad*) and *Lala Lala Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :

PEARSON, J. (OLDFIELD, J., and STRAIGHT, J., concurring).—The first point for consideration is whether this suit is barred by s. 93, Act XVIII of 1873. I hold it to be not so barred, for the matter in dispute is whether the plaintiff is entitled to demolish the well constructed by the defendant, and that is not a matter in respect of which a suit could be brought in the Revenue Court.

The next question is whether the suit is barred because the matter in dispute is a *res judicata*, in reference to the Revenue Court's decision in the former suit brought under cl. (b), s. 93 of the Rent Act, by the plaintiff for the ejectment of the defendant on the ground of misconduct in constructing the well, and I answer the question in the negative. The decision that the tenant could not be ejected from his holding without compensation being given to him for his outlay in constructing the well does not determine the plaintiff's right to demolish the well as having been constructed by a person not having a right to construct it. If the lower appellate Court has meant to rule that the suit is barred by

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the decision above mentioned, the first ground of appeal must be allowed to be valid.

But as regards the merits of the case, I am of opinion that s. 44 of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and it is not pretended that the well constructed by the defendant is not calculated to benefit the land. The plaintiff's suit therefore fails and has been properly dismissed. I would dismiss the appeal with costs.

STUART, C. J.—Mr. Justice Pearson has prepared a judgment in this reference which I have perused and considered, and in which I entirely concur, both as regards the order he proposes and the reasons he assigns for that conclusion.

Appeal dismissed.

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July 28.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BILASO (PLAINTIFF) v. DINA NATH AND OTHERS (DEFENDANTS). *

Hindu Law—Mitakshara—Joint undivided property—Widow's rights—Partition.

A Hindu widow, entitled by the Mitakshara Law to a proportionate share with sons upon partition of the family estate, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at the sale in the execution of a decree of the right, title, and interest of one of the sons in such estate before voluntary partition.

A certain dwelling-house was originally the ancestral property of one Beni and his brother Udai. Beni died leaving issue two sons, the defendants Lali Mal and Puran Mal, and a widow, the plaintiff, the mother of the defendants Lali Mal and Puran Mal. After the death of Beni and of Udai the share of the heir of Udai of the house, *viz.*, one moiety, was purchased by the defendant Dina Nath, who obtained a partition of this share. Subsequently the defendant Dina Nath purchased the rights and interests of the defendant Puran Mal in his father's moiety of the house in the

* Second appeal, No. 165 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 5th December, 1879, modifying a decree of Pandit Indar Narain, Munsif of the city of Bareilly, dated the 28th August, 1879.

execution of a decree. In June, 1879, the defendant Lali Mal obtained a decree against the defendants Dina Nath and Puran Mal for the partition of one-fourth of the house. The plaintiff now claimed the establishment of her right to, and partition of, one-third of her husband's moiety of the house, as against the defendant Dina Nath and the defendants Lali Mal and Puran Mal, alleging that she and her sons according to Hindu law shared equally. The defendant Dina Nath set up as a defence to the suit that a Hindu mother might claim her share of the ancestral family property upon the sons dividing it amongst themselves, but that she could not enforce a partition of the property as against the auction-purchaser of the rights and interests of the sons. The Court of first instance disallowed this defence, and gave the plaintiff a decree. On appeal by the defendant Dina Nath, the lower appellate Court dismissed the suit, holding that the plaintiff might claim maintenance or the right to reside in the house, but could not enforce a partition against an auction-purchaser. On appeal by the plaintiff to the High Court the Division Bench before which the appeal came for hearing (STUART, C. J., and STRAIGHT, J.,) referred the following question to the Full Bench, viz., "Whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons, before voluntary partition," the order of reference being as follows :

ORDER OF REFERENCE.—The question raised by this appeal is whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons before voluntary partition. The point is one of serious complexity and difficulty, and having regard to its importance and some conflicting decisions, we refer it to the Full Bench.

Munahi Hanuman Prasad, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji),
for the respondents.

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The Full Bench delivered the following

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JUDGMENT.—The plaintiff in this case, Bilaso, is a Hindu widow, the mother of two sons, Puran Mal and Lali Mal, who were members of an undivided family, and before partition the right, title, and interest of one son, Puran Mal, in a house forming the ancestral property were sold in execution of a decree and purchased by one Dina Nath, and subsequently the other son, Lali Mal, obtained a decree against the auction-purchaser entitling him to half the house. Bilaso has brought a suit to recover from the auction-purchaser and her son Lali Mal her share on partition of the property. The question referred to us is whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons before voluntary partition.

In an undivided family consisting of mother and sons, the mother is only entitled to maintenance so long as the family remains undivided in estate; but in case a partition is made the law gives her a right to an assignment of a share in the property left by her husband equal to a son's share. The right the mother has is a right to participate in the property left by her husband, and it has been described as a latent and inchoate right of participation which becomes effective when separation takes place. Such being the right of the mother, and the son's obligation towards her in respect of the assignment of a specific share of the property on partition, we have to see what position the purchaser in execution of the right, title, and interest of a member of an undivided family takes.

In *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (1) their Lordships of the Privy Council, referring to a co-parcener in an undivided family, observe: "His rights may pass to strangers, either by alienation, or, as in case of creditors, by operation of law, but in all cases those who came in, in the place of the original co-sharer, by inheritance, assignment, or operation of law, can take only his rights as they stand, including of course a right to call for a partition (2)." And more recently in *Deendyal Lal*

(1) 6 Moo. I. A., 526.

(2) At p. 539.

v. Jugdeep Narain Singh (1) it was held that the right of the purchaser at the execution-sale is limited to that of compelling the partition which his debtor might have compelled, had he been so minded before the alienation of his share took place. The auction-purchaser of the undivided interest of the son thus stands strictly in the place of the latter and is in no better position, and is bound by obligations which bound his vendor, and the mother's right to an assignment of a share out of the whole joint property will accrue on a partition being made, and is of a character which cannot be defeated by the purchaser. It may be noticed that in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) already referred to, their Lordships expressly refrained from making any declaration as to the extent of the judgment-debtor's undivided share acquired by the auction-purchaser, as they observe if a partition takes place his wife may be entitled to a share. The answer to the reference should be in the affirmative.

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PRIVY COUNCIL.

SOPHIA ORDE AND ANOTHER (PLAINTIFFS) v. ALEXANDER SKINNER
(DEFENDANT).

P. C.*
1880
June 10 & 11.

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Act VIII of 1859 (Civil Procedure Code), s. 5 — What constitutes "dwelling" within the meaning of that section — Commission, under a will, payable to manager of joint estate.

A testator bequeathed the income of his "altamgha," "zamindári," and "thika-dári lands" situate in the districts of Delhi, Hissar, and Bulandshahr, to his five sons in equal shares, and to their issue; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as "altamgha" were in the Bulandshahr district, within the local limits of the jurisdiction of the Civil Court of Meerut; and on them an establishment was maintained at the expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Delhi. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses "with mutual consent in the altamgha and zamindári;" also that certain memorials of the testator were to be retained by the manager at Bilaspur.

* Present: SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. F. COLLIER.

(1) L. L. R., 3 Calc, 193.

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At this place the manager used to stay, occasionally, though travelling, for the most part, about the estate during the cold weather.

No particular place for rendering the yearly accounts was fixed, either by contract or in practice, but they were rendered by the manager to the sharers at different times and in different places, including Delhi, Bilaspur, and Hansi; at which last place, it being the sadr station of Hissar, the older records of the estate were kept.

When this suit was brought the manager was actually residing at the hill station of Mussoorie, in the Saháranpur district, for the hot weather; and in his answer he stated that the unsettled accounts were open to inspection by the sharers at Bilaspur.

Held that a person might "dwell," within the meaning of Act VIII of 1859, s. 5, at more places than one; and that, on the evidence, this manager so dwelt at Bilaspur as to make him subject to the jurisdiction of the Meerut Court in this suit. It was, accordingly, not necessary to consider whether he was or was not also subject to that Court's jurisdiction by reason of the cause of action having arisen within its local limits; nor was it necessary to consider whether he had, or had not, such a dwelling-place at Hansi as would have rendered him subject to the jurisdiction of the Hissar (Panjab) Courts.

Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing, or varying, the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was held to be settled by the indication of the latter mode of calculation in the will.

Appeal from a decree of the High Court, North-Western Provinces (5th April, 1877), reversing the decree of the Subordinate Judge of Meerut (27th June, 1876).

This suit was instituted by the plaintiffs-appellants to obtain from the defendant-respondent an account, during the whole period of his management, from 1863 to 1874, of the joint estate of the family of the late Colonel James Skinner, C.B., who died at Hansi in 1841; and to obtain payment to the plaintiffs of money due in respect of their share (one-fifth of the rents and profits of the estate) under the will of the deceased. On objections by the plaintiffs to the expenditure which the defendant sought, by the accounts produced by him, to charge against the estate, a decree for Rs. 92,250, principal and interest, due in respect of their share, was made in favour of the plaintiffs, in the Court of the

Subordinate Judge of Meerut. This decision was reversed by the High Court, on appeal, on the ground that the defendant was not, under the Code of Civil Procedure, Act VIII of 1859, s. 5, subject to the jurisdiction of the Meerut Court.

The judgment of the High Court was as follows :—

“ In support of the jurisdiction of the Court of Meerut it has been argued that the cause of action arose in the district of Bulandshahr, which, as we have said, forms part of the Judgeship of Meerut, in that the appellant was bound to render accounts at the chief seat of the family, Bilaspur, which is the fort and residence built on the *altamgha* grant, and secondly, in that the appellant must be held to have resided, at the time suit was brought, at Bilaspur, inasmuch as the family-house is there maintained at the cost of the estate. We proceed to dispose of the latter of these arguments first. It is admitted that Alexander Skinner, at the time suit was brought, was actually residing at Mussoorie, in the district of Saháranpur. He has there a private house in which he resides during the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at Hansi, sometimes at Delhi, and sometimes at Bilaspur, in one of the houses which have been maintained at the expense of the estate. Under these circumstances, we hold he was not dwelling within the jurisdiction at the time suit was instituted. In this country it frequently happens amongst Hindus, that a family-house is kept up at the expense of an undivided family, but it has never, so far as we are aware, been contended that each member of the family must be held to dwell in the family-house, because he may occasionally visit and has a right to reside in it, although he may have his permanent abode elsewhere, and be dwelling in his permanent abode at the time the suit was instituted. It will be convenient here to deal with another argument which might have been, but was not, advanced in support of the jurisdiction of the Court of Meerut, that the appellant was at the commencement of the suit personally working for gain within the local area of that Court's jurisdiction. We hold that, although the appellant was entitled to a commission on the income of the *altamgha* estate, and although as manager it was, no doubt, necessary for him occasionally to visit that estate, yet as he was

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not bound to reside on the estate, or to hold his office there, and did not in fact dwell there, nor, as we shall presently show, have his office there, he was not personally working for gain in the district of Bulandshahr, when the suit was instituted. It remains then only to deal with the argument that the cause of action arose in the district of Bulandshahr. The will of Colonel James Skinner gives no directions as to the place at which the manager was to render accounts. In the will, immediately after the bequest of the income to his sons, he declares that, if they like to live together, they may live at Bilaspur, and build houses with mutual consent in the altamgha and zamindári, and, in another passage, he directed that his trophies and the presents he had received from his commanding officers should be retained by the manager of the estate at Bilaspur; but there is no direction that the head-office of the estate, which, during the testator's lifetime, had been at Hansi, should be removed to Bilaspur. Nor do we find any sufficient evidence that, at the time the suit was brought, agreement or practice pointed to Bilaspur as the place at which the accounts were to be rendered. The respondents' pleader does not allege there was any agreement to that effect. He can refer only to the notification issued by the appellant some months after the suit was brought, inviting the sharers to meet at Bilaspur and inspect the account. But against this piece of evidence we have the fact that the accounts had never previously been examined at Bilaspur, and that, on the only other occasion on which they had been shown, the examination was made by the respondent Mrs. Orde, in 1871, at Delhi. In the absence of any special direction by the testator, or any agreement or practice of the parties, the rule established in *Luck-mee Chund v. Zoravur Mull* (1), which has been cited by the learned counsel for the appellant, is, in our judgment, applicable. The place at which the general business of the family was transacted, and the general accounts kept, must be held to be the place where the contract is to be performed. We do not agree with the Subordinate Judge, Mr. Smith, that the office at Hansi was a mere place of deposit for old records. It appears from the evidence of Shaikh Salimullah, who was employed as a servant of the estate in 1859,

(1) 8 Moore's I. A., 291.

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that during the management of James Skinner the office at Hansi was regarded as the chief office of the estate, and that the papers were prepared there and sent to the manager for signature. It also appears from the evidence of this witness, and of the witness Cheda Lal, that the office at Hansi has been continued as the chief office during the time the estate was managed by Hercules and Thomas Skinner, and by the appellant, up to the date on which the suit was instituted. The course of business, with regard to the accounts, appears to be as follows:—Daily accounts of receipts and disbursements are sent from each of the several estates to the manager. These accounts remain with the manager for three years, and are then sent to Hansi; but from them a monthly account is made up and sent to Hansi. Annual or six-monthly accounts are sent from each of the several estates to the manager, and to the office at Hansi. From what we may term the travelling office, which accompanies the manager, an abstract is prepared and sent with an account of his share to each sharer. The moneys are deposited with a banker at Delhi, and all the sharers (except Thomas Skinner, who lived at Bilaspur, and, to avoid the banker's charge for remittance, drew his share directly from the income of the Bilaspur estate) were paid by drafts on the banker at Delhi, which drafts the appellant's counsel asserts were drawn at Hansi. However this may be, it is proved that in 1860 notice was given to the revenue officer that the head-office of the estate was at Hansi, and that income-tax would be paid there. In a letter written, it is said, from Delhi by the respondent James Skinner to the appellant, dated the 19th December, 1871, the respondent appears to request that the papers might be sent to him from Hansi, as the usual place of deposit; and in a letter dated the 8th December, 1871, by both the respondents to the appellant, they request him to cause their names to be entered as co-heirs of James Skinner, deceased, in the 'office' of the Skinner estate. We conclude then that the sharers recognised a particular office for the general business of the family, and that office was the office at Hansi. Under these circumstances, applying the rule to which we have alluded, we hold that the cause of action arose at the office in the district of Hansi, in the Delhi Division."

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Mr. Leith, Q. C., and *Mr. Doyne*, for the appellant, argued that the decision of the Court of first instance on the question of jurisdiction had been reversed by the High Court on insufficient grounds. The defendant had a dwelling at Bilaspur within the meaning of s. 5 of Act VIII of 1859, and he was, therefore, subject to the jurisdiction of the Meerut Court. He was also subject to it by reason of the cause of action having arisen at Bilaspur. In reference to this latter ground of jurisdiction they pointed out that the liability of this manager of a joint estate was not, either by contract or usage, limited to the obligation to account at Hansi. No head-office had been established for the transaction of the business of the estate as between the sharers and the manager, and the principle indicated in *Luckmoe Chund v. Zrawur Mull* (1) had no application in this case. In reference to the former they pointed out that there might be "constructive inhabitancy," citing *Khamah Dossee v. Sibpersaud Bhoose* (2). They also referred to Regulation II of 1803, ss. 3, 4, and 5, and to *Barlow v. Orde* (3).

Mr. Cowie, Q. C., and *Mr. Graham*, Q. C., contended that the reversal was right. The question was whether, on the 8th of August, 1874, when this suit was brought, the defendant was dwelling within the local limits of the jurisdiction of the Meerut Court. He could not be held to have been so "dwelling." On this point they cited *Macdougall v. Paterson* (4), and argued that it was necessary to fall back, in consequence of the absence of the defendant at Mussoorie, on the "place where the cause of action arose;" which could not be said to be Bilaspur, but was Hansi, as found by the High Court. They referred to s. 33 of Act VIII of 1859, repealed by s. 1 of Act XXIII of 1861.

Appellants' counsel were not called on for a reply.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—This appeal is one of several which have come before this Board in suits concerning the estate of the well-known Colonel James Skinner, the construction of his will, and the somewhat peculiar relations of his descendants *inter se*. Colonel

(1) 8 Moore's I. A., 291.

(3) 13 Moore's I. A., 277.

(2) Morton's Decisions, Supreme Court, Bengal, 181.

(4) 11 C. P., 755; 21 L. J., N. S. C. B., 27.

Skinner died in 1841, leaving five sons besides other children. His public services had been rewarded by a large altamgha grant of land in the district of Bulandshahr, which lies within the local jurisdiction of the Judge of Meerut in the North-Western Provinces; and he had also considerable landed and other property at Delhi and other places which are now, for all civil purposes, annexed to the Panjab, and notably an estate called Haryana, in the district of Hissar, of which the chief or sadr station is Hansi. Upon the lands constituting the altamgha he built a fort, and that estate seems to have thereafter acquired, if it did not before possess, the name of Bilaspur. At the time of his death he was resident at Hansi, where the corps of cavalry which he commanded was stationed.

His will bears date the 10th of May 1841. The material passages of it are the following :—" I leave and bequeath the income of my altamgha, zamindári, and thika villages, gardens, and houses to my five sons herein named, Joseph, James, Hercules, Alexander, and Thomas Skinner, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the altamgha or zamindári. One of my sons, whichever is most fit or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income; and he is bound to show a faithful account current yearly to his brothers. Should they like to live together they may live at Bilaspur, and build houses with mutual consent in the altamgha or zamindári. Should my personal property not pay off all my debts, they may sell my house at Delhi and my garden at Trevelyan Ganj; but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five sons."

Then follows a clause providing for the event of any of the sons dying under age and without issue, and the next material clause is: "I will and declare that it is my intention and meaning that, in the event of all or any of my afore-mentioned sons, Joseph, James, Hercules, Alexander, and Thomas Skinner, dying and leaving issue or children, the shares of the fathers shall devolve on the issue or children, to be by them divided in equal shares." And

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in a subsequent part of the will is this clause: "All my trophies and presents given by my commanders to be retained by the manager of the estate at Bilaspur, as remembrance of me to the survivors of the family." The appellants, the plaintiffs in the suit, are children of James, one of the sons who are now deceased; and whatever doubts may at one time have been raised as to their title, it has now been conclusively determined, by the decision of this Board in *Barlow v. Orde*, (1) that they are entitled in equal moieties to the share and interest of their father under their grandfather's will. The respondent, Alexander, is one of the surviving sons of the testator, and the present manager of the estate under the terms of the will. There can, therefore, be no doubt that in a suit instituted in the proper *forum* he is accountable to the plaintiffs for their father's $\frac{1}{4}$ th share in the net income of the whole estate.

The suit, which may be taken to be one to enforce this accountability, was instituted in the Court of the Subordinate Judge of Meerut on the 8th of August, 1874. It claimed an account from February, 1863, to 1874, the whole period of the defendant's management.

The defendant, by the written statement first filed by him, objected that the plaintiffs had not observed the provisions of ss. 12 and 13 of Act VIII of 1859, which relate to suits for land lying within different jurisdictions, and also that the suit was triable only by a Revenue Court,—objections now admitted to be futile; and on the merits, not disputing his general liability to account, he insisted that the accounts had been settled up to the year 1280 fasli (1872-3), and that the subsequent accounts were then lying for inspection by the sharers in the estate, in the manager's office, which would remain at Bilaspur from the 2nd of January to the 2nd of February, 1875.

After the issues had been settled a further objection to the jurisdiction of the Court was taken. In what precise form it was originally taken does not appear, except by the statement of the then Subordinate Judge in his proceeding. That statement is as follows:—"Among those pleas there was one to the effect that, as

(1) 13 Moore's I. A., 277.

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the head-office of the estate was at Hissar, in the Panjab, the suit for the rendition of accounts could not be laid in the Meerut Civil Court. On the date fixed, the evidence offered by the parties on that point was received, and after a consideration of the evidence so tendered and received, my predecessor, Mr. Smith, came to the finding that, to quote his words, 'the Hansi office is apparently a mere dépôt for the custody of the old accounts and papers relating to the estate. The managers appear to be peripatetics, carrying with them their office, and transacting the business of the estate from wherever they happen to be. A manager may choose to store his books wherever he pleases; but the founder of the family specified Bilaspur as the family home, and where all insignia of the family are still kept, and consequently a suit for settlement of any account relating to the general estate must fall within the jurisdiction of the Meerut Court, under which Bilaspur is included.' The above decision was come to on the 20th April 1875; and after the determination of that and other preliminary points, the accounts of the estate were examined by a Commissioner appointed for the purpose, and, when after the lapse of several months, and at heavy cost to the plaintiffs, the examination of the accounts was nearly over, a petition was filed on the part of the defendant, tendering in evidence a copy of a vernacular proceeding dated 13th October, 1860, and a parwanah in original from the Deputy Commissioner of Hissar, addressed to Khyali Ram, agent of the Skinner estate, stationed at Hansi, dated the 16th October, 1860, and referring to a book in which copies of parwanahs addressed to Khyali Ram were kept, and which had been produced in a suit between the parties, or at least some of them, and contending that, as those documents would show that the head-office was at Hansi, the suit for rendition of accounts could not lie in the Civil Court of Meerut."

The petition here referred to is at pages 3 and 4 of the record, and the effect of the final judgment of the then Subordinate Judge upon it, on the 27th of March 1876, was to affirm the decision of his predecessor, Mr. Smith, upon this objection to the jurisdiction. The suit accordingly proceeded before him, the accounts taken being, apparently, by force of the Statute of Limitations, limited to

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the six years immediately preceding the institution of the suit; and on the 27th of June 1876 the Subordinate Judge gave his judgment upon the merits. From this it appears that on the face of the accounts rendered there was due to the plaintiffs, deducting the payments made on account to them, an admitted balance of Rs. 7,462-2-4; that the plaintiffs, having been allowed to surcharge and falsify the accounts, had succeeded in raising that balance to the principal sum of Rs. 61,427-11-10, for which, with the further sums allowed for interest and costs, amounting in all to Rs. 94,957-15-10, a decree was passed against the defendant. From this decree he appealed to the High Court of the North-West Provinces. The first of his grounds of appeal was that, with reference to s. 5 of Act VIII of 1859, the lower Court was wrong in holding that it had jurisdiction to hear the cause. There were 11 other grounds of appeal, some of which it will be necessary to notice hereafter; but the appeal was heard by the High Court upon the first alone, when, holding that the lower Court had no jurisdiction to entertain the suit, it reversed the decree and dismissed the suit.

The sole question argued in the first instance before their Lordships was that of jurisdiction; they have already intimated that their opinion upon it is adverse to that of the High Court, and their reasons for that conclusion will now be stated.

It is conceded on both sides that the question turns on the construction to be put upon the 5th section of Act VIII of 1859; and that it lay on the plaintiffs to show that either the cause of action arose, or the defendant at the time of the commencement of the suit was dwelling, within the limits of the jurisdiction of the Meerut Court, within the meaning of that enactment.

Their Lordships will first consider whether the defendant was subject to the jurisdiction of the Court by reason of his dwelling within its local limits. Some evidence was given on this point, and the conclusion of the High Court upon it is thus expressed: "It is admitted that Alexander Skinner, at the time the suit was brought, was actually residing at Mussoorie, in the district of Saharanpur. He has there a private house, in which he resides during

the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at Hansi, sometimes at Delhi, and sometimes at Bilaspur, in one of the houses which have been maintained at the expense of the estate." One of the witnesses, indeed, went so far as to affirm that the defendant's sole permanent residence on the plains was at Hansi; but the High Court has not acted on that evidence, which their Lordships think is untrustworthy. It is not contended that the proper *forum* for the trial of this suit for account was at Saháranpur, by reason of the defendant's residence, at the time of its commencement, at the hill station of Mussoorie. Such residence was obviously more or less of a temporary character, like that of a man in this country who lives in a house of his own at a watering-place during a portion of the year. And if the defendant can be said to have had any permanent dwelling-place on the plains and within the ambit of the Skinner estate, he would not the less dwell there, according to the proper and legal construction of the word, because for health or pleasure he was passing the hot season on the hills when the plaint was filed. The question then is, did he not "dwell" at Bilaspur within the meaning of the section?

He was not a mere manager, though in this suit he is accountable in that character. He was one of the five original sharers in the estate, and as such he was one of the proprietors of the fort and residence at Bilaspur. Their Lordships cannot doubt on the evidence that there was a place of residence there, and are of opinion that the clauses in the will which have been cited show that the testator and founder of the family contemplated that it might be the principal place of residence of his family. He undoubtedly treated it as the place in which the honourable memorials of himself and services were to be permanently preserved. Again, their Lordships think it is sufficiently shown upon the evidence that an establishment of some kind was kept there, and that the defendant himself, though travelling for the most part during the cold weather about the estate, occasionally resided there, as he had an unquestionable right to do, for periods of time more or less considerable. In his own notice of the 13th October, 1874, he called upon the

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other sharers to come and examine the accounts in the manager's office, which "would remain at Bilaspur from 2nd January to 2nd February." A man, however, may have more than one dwelling-place; and it is unnecessary to consider whether the defendant may not have also such a dwelling-place at Hansi as would subject him to the jurisdiction of the Courts of the Panjab. It is sufficient to decide, as their Lordships do decide, that the defendant so dwelt at Bilaspur as to make himself subject to the jurisdiction of the Meerut Court in this suit.

This being so, it is unnecessary to consider whether he is also subject to the jurisdiction of that Court by reason of the cause of action having arisen within the local limits of that jurisdiction, a question which upon this record presents some difficulty.

Their Lordships, however, deem it right to say that they cannot agree with the High Court in its conclusion that the sharers had recognised a particular office for the general business, that office being the one at Hansi; and that accordingly the cause of action must be taken to have arisen in the district of Hansi, and in the division of Delhi. They think that, on the contrary, no particular place for rendering the accounts has been fixed either by contract or practice, and that the evidence, confirmed by the defendant's own written statement, shows that they were rendered and examined at different times in different places, including Delhi and Bilaspur, Hansi being shown to be, as Mr. Smith found, only the repository of the older and settled accounts.

It follows from their Lordships' decision on this question of jurisdiction, that the decree of the High Court cannot stand. It seemed, however, to them that the defendant was entitled to have the other objections to the decree of the lower Court which had been taken by his grounds of appeal argued and determined; and that it would be most convenient to have them, if possible, determined here. Counsel have accordingly been heard upon such of them as have not been abandoned; and their Lordships have now to decide whether, in respect of any of them, there is any sound reason for reversing or varying the decree of the lower Court.

These objections are comprised in the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh of the grounds of appeal.

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The fifth, which is the first of those which have been argued, is perhaps the most important. It is, in terms, that the lower Court is wrong in holding that the defendant is not entitled to charge commission upon the gross income of the estate.

The question between the parties was, whether the 10 per cent. commission to which the defendant was unquestionably entitled was to be calculated upon the gross collections, or upon some larger collections, or, as the Judge has found, and as the plaintiffs contend, upon the net income of the estate, being the fund which, subject to that commission, was divisible amongst the co-sharers.

The judgment of the Subordinate Judge (which, their Lordships have no hesitation in saying, is an extremely careful and well-considered one) has decided that point in favour of the plaintiffs. He has considered the question with reference both to the construction of the will, and to the practice which has prevailed, with more or less variation, during the time of the present and the former managers.

Their Lordships think that, if the question is clear one way or the other upon the construction of the will, that construction should prevail, whatever variation there may have been in practice; and they are of opinion that the construction for which the plaintiffs contend is the true one. The clause which has already been read deals with the income of the *altamgha*, *zamindári*, and the rest of the estate as one fund. The testator gives that income to his five sons, there named, to share alike. It is obvious, therefore, that the word "income," as used in that passage, means the divisible fund. It was a fund to arise from the net returns from the different estates, on some of which were *indigo* factories, which were in the nature of trading concerns. An increased profit on one estate might be met by a loss on another; but the profits and losses were all to enter into one account, the balance of which was to constitute the divisible income or fund.

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Then that portion of the clause which relates to the manager is as follows:—"One of my sons, whichever is most fitted or whoever I may name hereafter, is to manage the whole concern,"—that is, the whole of the estates,—whatever was to contribute to the divisible fund,—“for which trouble he is to get 10 per cent. from the whole income, and he is bound to show a faithful account current yearly to his brothers.” Their Lordships think there are no grounds for construing the word “income” in this passage in a sense different from that in which it is used in the other; and that there is nothing to support the contention that the manager was entitled to charge commission upon each sum which came to his hands from each separate estate or source of income; still less to charge it upon the nominal rents payable by the tenants or cultivators, irrespective of the costs of collection. They are of opinion that the only way to make the whole will consistent is to hold that the commission was to be calculated upon the net fund divisible among the five sharers. Therefore, upon this item their Lordships agree entirely with the finding of the Subordinate Judge.

The sixth ground of appeal related to the disallowance of certain sums amounting in all to Rs. 24,14,753, being expenses incurred by the manager which the Judge held he was not entitled to charge against the plaintiffs, as representatives of one of the co-sharers. The defence of the items impeached which was set up by the defendant was that the expenses in question, or the major part of them, consisted of the cost of the establishment kept up for the purposes of the estate, the user of which was incident to his office of manager. But the learned Judge has found upon the evidence that the defendant entirely failed to make out that defence, as a matter of fact; and that the greater part of those expenses would never have been incurred but for his choosing, for his own convenience and enjoyment, to reside during the greater portion of the year at the hill station of Mussoorie.

Their Lordships, therefore, think there is no ground for interfering with the learned Judge’s disallowance of these items.

The seventh and eighth grounds of appeal relate to the house at Delhi. The first of them objects to the disallowance of a large sum of money as expenses improperly incurred, so far as the estate was

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concerned, in repairing, altering, and furnishing that house. The house was the well-known house of the testator at Delhi. In his will he directs that, if it should be necessary for the purposes of paying his debts, the house should be sold ; but if it were not sold, it should be let on account of the estate. Upon the evidence it would seem that up to the time of the Mutiny the house neither sold nor let, but, by the common consent of the co-sharers, was kept up more or less for their common benefit as a mansion at Delhi. After the Mutiny, during which it had been looted and greatly injured, the estate received from the Government, by way of compensation in respect of it, a sum of Rs. 18,000. That sum they seem to have agreed, not to lay out upon the house, but to divide as part of the profits of the estate. The house, however, must have been put into some sort of tenantable repair, since it was let first as a mess-house, and afterwards as a hotel for several years. The defendant then saw fit to put an end to the lease of the keepers of the hotel, and to lay out a very considerable sum of money upon the house in repairs, alterations, and furnishing; and from that time he appears to have occupied it, whenever he was at Delhi, more as his own residence than as anything common to the family at large. At all events, no authority whatever has been shown for the very considerable expenditure incurred upon it, as before mentioned. In these circumstances the Judge below has allowed all that was expended upon necessary repairs, and has disallowed the considerable sums spent in excess of that, treating them as having been laid out by the defendant on his own account. He has also disallowed whatever expenses of the establishment are attributable to the private purposes of the defendant, as contrasted with the establishment which would necessarily be kept up in the house to protect and preserve it whilst unlet. In that allowance, and that disallowance, their Lordships think he was right.

But then the question is raised by the eighth ground of appeal whether he is right in charging the defendant with an occupation rent of the house, as if it had been let to him. Their Lordships think that this is consistent with the will, which directs that the house, if not sold, should be let, as was done for a considerable period, and with the justice of the case. There is nothing in the

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will which gives the manager the power of taking this house out of the general estate, in order to occupy it as his own exclusive residence. They are therefore not disposed to allow this objection.

The objections raised by the ninth and tenth grounds of appeal have not been pressed.

The objection, however, to the amount decreed on account of interest, which is raised by the 11th ground of appeal, has been strongly pressed. That interest should be allowed, to some amount, their Lordships have no doubt. The suit is for an account of what is due to the plaintiffs in respect of their share. The defendant has to account for all his receipts on account of the estate, and has a right to set up by way of discharge whatever he can properly claim under that head. It appears that when the suit was instituted a very large sum was due from him to the plaintiffs, even upon his own mode of stating the accounts. After the suit was instituted he paid into Court a considerable sum, and reduced the admitted debt to Rs. 7,000 odd ; but if he has during all this time kept the plaintiff out of her share, he ought, upon every ground of justice and equity, to pay some interest upon it ; and if the admitted debt would carry interest, so the sum of Rs. 61,000, to which that debt has been swollen by the disallowance of items of discharge improperly claimed, ought also to carry interest. Their Lordships can make no distinction between the claim for commission and the other sums which have been disallowed. The defendant was bound to know how his commission was to be calculated. But then it is contended that the rate of interest allowed is excessive.

What the Judge has done has been to give 12 per cent. interest up to the date of the suit, to give 12 per cent. interest on the principal amount from the date of the institution of the suit up to the date of the decree, and to direct that the decree, when compounded of the principal, interest, and costs, should carry interest only at six per cent. It has been argued that the Court rate of interest is now six per cent. ; and that the interest decreed should have been calculated throughout at that rate. The only rule or enactment

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regulating the conduct of the Judge in respect of the allowance of interest to which their Lordships have been referred is the 10th section of the Act of 1861, which says, "When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of the suit; with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." Of course, the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest.

Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shown that there has been any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs interest at only 6 per cent., does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decree, and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, viz., 12 per cent. Hence their Lordships are of opinion that the Judge, in calculating the interest as he has done, has done nothing which he was not entitled to do.

It seems, therefore, to their Lordships that, the objections argued having all failed, they must humbly advise Her Majesty to reverse the decree of the High Court, and to confirm the decree of the Subordinate Judge, with the costs incurred in the High Court; and that the plaintiffs are also entitled to the costs of this appeal.

Solicitor for the appellants: Mr. T. L. Wilson.

Solicitors for the respondent: Messrs. Barrow and Rogers.

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June 28.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

**RAGHOBIR SINGH (PLAINTIFF) v. DHARAM KUAR AND ANOTHER
(DEFENDANTS).***

Multifarious Suit—Court-fees on Plaint and Memorandum of Appeal—Act VII of 1870 (Court Fees Act), ss. 7, 8, 17, sch. i, No. 1.

The rule laid down in s. 17 of the Court Fees Act regarding multifarious suits is subject to the proviso at the end of No. 1, sch. i of that Act, and the maximum fee leviable on the plaint or memorandum of appeal in such a suit is, under that proviso, Rs. 3,000.

THE plaintiff in this suit claimed possession of the "Lan-dhora estate" and all the rights appertaining thereto, valued at Rs. 21,46,006-2-0; and mesne profits of that estate from the 1st January, 1871, to the date of the institution of the suit, the 15th January, 1877, valued at Rs. 10,00,000. He stated that his cause of action arose in April, 1868, the date of his dispossession. He paid in respect of his plaint an institution-fee of Rs. 3,000; and on appeal to the High Court from the decree of the Court of first instance dismissing the suit, he paid in respect of his memorandum of appeal a similar court-fee. The Office of the High Court reported to the taxing-officer that the proper court-fees had not been paid on the plaint and memorandum of appeal, the report being as follows:—"The court-fee leviable on each of the two distinct subjects embraced in the suit and the appeal would amount to Rs. 3,000, or Rs. 6,000 for the entire claim; but the plaintiff-appellant has paid only Rs. 3,000, both on the plaint and the memorandum of appeal: there is then a deficiency of Rs. 3,000 in each, or Rs. 6,000 in both instances." The decision of the taxing-officer was as follows:—"Under the recent Full Bench ruling—*Mul Chand v. Shih Charan Lal* (1)—the suit embraces two 'distinct subjects' within the meaning of s. 17 of the Court Fees Act. I am in doubt, however, how far the proviso to art. 1, sch. i, affects the operation of that section. Probably the words 'not otherwise provided for in this Act' in art. 1,

* First Appeal, No. 120 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 28th May, 1878.

(1) I. L. R., 2 All., 676.

column 1, contemplate the case provided for in s. 17. If so, the office-report would be right, and a deficiency of Rs. 3,000 in this Court, and of the same amount in the lower Court, would have to be made good." The question raised by the taxing-officer was referred to the Full Bench for consideration.

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Mr. *Howard*, the Senior Government Pleader (*Lala Juala Prasad*), and Munshi *Hanuman Prasad*, for the appellant.

Messrs. *Conlan and Colvin*, Pandit *Bishambhar Nath*, and Babu *Opokash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—A difficulty, rather merely logical than material, presses on my mind in this case. We have already ruled in a Full Bench case—*Chamaili Rani v. Ram Dai* (1)—that, where a plaintiff embraces different subjects of claim which are so many distinct causes of action, the court-fee shall be the aggregate of the fees separately chargeable on the separate causes of action, or, in other words, such causes of action as could separately and singly be the subject-matter of separate and distinct suits. And applying this ruling it might fairly and consistently be argued that the proviso in sch. i, No. 1, in the Court Fees Act, "that the maximum fee leviable on a plaint or memorandum of appeal shall be Rs. 3,000" applied to plaints or memoranda of appeal when the cause of action was a single subject of claim. But this view of the Court Fees Act would in many cases work so extravagantly as to make the court-fee payable under it rather in the nature of a penalty, as remarked by Straight, J., than as reasonable stamp duty, and I therefore willingly support the opinions of my colleagues on the point. As to the words "not otherwise provided for in this Act," I have little doubt they refer to the plaints and memoranda of appeal mentioned in sch. ii of the Act.

PEARSON, J.—The words "otherwise provided for in this Act" apparently refer to the provisions made for plaints and memoranda of appeal in certain suits in sch. ii. The rule laid down in s. 17 regarding multifarious suits must, in my opinion, be held to be subject to the proviso at the end of art. 1, sch. i.

(1) I. L. R., 1 All., 552.

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SPANKIE, J.—I concur with Mr. Justice Pearson and my colleagues generally.

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OLDFIELD, J.—By s. 17, Court Fees Act, “where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal is chargeable with the aggregate amount of fees to which the plaint or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.”

Art. 1, sch. i, gives the amount of fees chargeable on plaints or memoranda of appeal not otherwise provided for in the Act. Art. 1 is as follows:—“Plaint or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court, except those mentioned in s. 3;” and the proper fee is stated and reference is made to the table annexed to the schedule for ascertaining the proper fee leviable on the institution of a suit; and at the end of art. 1 is this proviso: “Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.” The question before us is whether this proviso applies to limit the fee chargeable on a plaint or memorandum of appeal of the nature of those mentioned in s. 17; and it is contended that it does not, as they are taken out of the operation of art. 1, sch. i. by being “otherwise provided for in the Act,” that is, provided for by s. 17.

In my opinion this contention will not hold good. It is true that by the terms of art. 1, sch. i, that article will not apply to a plaint or memorandum of appeal “otherwise provided for in the Act,” but those words mean a provision fixing the amount of fees chargeable, and a plaint or memorandum of appeal will not come under the operation of art. 1, sch. i, for which a proper fee has been provided in some other part of the Act. Now s. 17 of the Act makes no provision of this kind for the proper fee to be charged; it merely lays down a general rule that, where a suit embraces two or more distinct subjects, the plaint shall be charged with the aggregate amount of fees to which the plaint or memoranda of appeal in suits embracing separately each of such subjects would be liable under the Act. S. 17 does not pretend to fix the amount of the fee, but, on the other hand, expressly refers to other parts of the Act for

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the amount, that is, to the schedules, which alone deal with the amount; and the general rule in s. 17 becomes necessarily governed by rules as to the amount of the fee to be found in the schedules, and among them by the proviso in art. 1, sch. i, limiting the amount of fee on a plaint or memorandum of appeal of the nature of those referred to in s. 17; for no other part of the Act deals with the amount, and, if the article is to be applied, it must be applied in its integrity, and with the proviso which it contains fixing a maximum fee leviable, a proviso which is in no way inconsistent with the application of the general rule contained s. 17, but which governs its application.

In the case before us therefore the court-fee will be limited to Rs. 3,000.

STRAIGHT, J.—I am entirely of the same opinion as Mr. Justice Oldfield, and I quite agree in the view he expresses as to the position occupied by s. 17 of the Court Fees Act towards the other provisions in the body of the Act itself and in the schedules, relating to the mode in which fees payable in suits are to be computed. Ss. 7 and 8 specifically declare the rates at which relief by suit of a particular class or character, therein defined, is to be calculated. The category of likely causes of action is as far as can be exhausted, but in order to guard against the possibility of cases arising, for which no provision had been made, sch. i, art. 1 of the Act, is so expressed as to include “any plaint or memorandum” of any kind or description other than that contemplated by ss. 7 and 8. The words “not otherwise provided for in this Act,” in my judgment, relate back to those two sections, and not to s. 17, and it therefore appears to me that the proviso at the end of art. 1 of sch. i applies generally and fixes the maximum fee leviable on *any* plaint or memorandum of appeal at Rs. 3,000. In reference to this it may be remarked that the Legislative authorities might naturally enough have intended to fix some limitation to the tax on institution of litigation; they certainly could not have had in view the establishment of an impost of so elastic and indefinite a kind, that the machinery of the Courts could only be set in motion to recover large claims by persons of very great wealth. A maximum of Rs. 3,000 would seem to be a reasonable one, and any thing beyond

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it would partake of the nature of a penalty for praying in aid the assistance of the legal tribunals. No other provision relating to the point is to be found in the Court Fees Act, except in the schedule, as already mentioned; and, as it is impossible to understand any principle of justice or equity or any rule of construction by which the proviso as to the Rs. 3,000 should be confined merely to the suits detailed in art. 1, I think it must be taken to apply generally and to establish the maximum amount of court fees that may be charged for any suit.

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August 2.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt, Chief Justice, and Mr. Justice Oldfield.

SANGAM RAM (DEFENDANT) v. SHEOBART BHAGAT (PLAINTIFF).

Sale in Execution of decree—Order setting aside sale—Suit to set aside such order—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257.

Certain immoveable property was put up for sale in the execution of *B's* decree and was purchased by him. Subsequently, on the same day, such property was put for sale in the execution of *S's* decree and was purchased by him. *B* objected to the confirmation of the sale to *S* on the ground that *S's* decree had been satisfied previously to such sale, and the Court executing the decrees made an order setting aside such sale on that ground. *S* thereupon sued *B* to have such order set aside, and to have such sale confirmed, and to obtain possession of such property. *Held* that, inasmuch as such order had not been made under s. 257 of Act VIII of 1859, but had been made at the instance of a purchaser under another decree, and *B's* decree, as a matter of fact, had not been satisfied, *S's* suit to have such order set aside was maintainable.

The lower Court having given *S* a decree awarding possession of such property, as well as a declaration of his right to have such sale confirmed, the High Court set aside so much of that decree as awarded possession of such property (1).

Behari Bhagat, the father of the plaintiff in this suit, was the holder of two decrees against one Abadi Begam, one for Rs. 1,812-2-10, and the other for Rs. 5,151-15-6, both decrees enforcing the mortgage of property belonging to the judgment-debtor. In the course of the execution of the decree for Rs. 5,151, Behari Bhagat and Abadi Begam came to a compromise, under

* Second Appeal, No. 479 of 1879, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 31st January, 1879, reversing a decree of Maulvi Muhammad Bakhsh, Additional Subordinate Judge of Gházipur, dated the 20th June, 1878.

(1) See *Farzand Ali v. Alimullah*, I. L. R., 1 All., 272, and the cases cited in note (1) to that case.

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which the latter agreed to sell the former a mauza called Aurangabad for Rs. 4,000. Before the conveyance was delivered Sangam Ram, the defendant in the present suit, who also held a decree for money against Abadi Begam, and had applied for its execution, applied to the Court executing his decree and Behari Bhagat's decrees, that the sum of Rs. 4000 above-mentioned should be set-off against Behari Bhagat's decree for Rs. 5,151-15-6. On the 18th July, 1876, the Court recorded a proceeding stating that, after deducting Rs. 4,000, a sum of Rs. 1,107, or thereabouts was still due to Behari Bhagat on account of that decree, and that, if such sum was paid by Sangam Ram, the sale of a mauza called Hardya, which had been notified for sale in the execution of that decree, would be postponed. Sangam Ram did not pay such sum, and the mauza was eventually sold as hereinafter stated. On the 27th July, 1876, Behari Bhagat preferred a petition to the Court in which he stated that he had purchased Aurangabad from his judgment-debtor, and that the decree for Rs. 1,812 had been completely satisfied, and a sum of Rs. 2,187 only was due on account of the decree for Rs. 5,151-15-6. Thereupon, on the 12th August, 1876, the Court recorded a proceeding to the effect that, as the parties had adjusted their claims by mutual consent, a revised account should be prepared, which was done. On the 20th November, 1876, the rights and interests of the judgment-debtor in Hardya were put up for sale in satisfaction of the balance of Behari Bhagat's decree for Rs. 5,151, and sold for Rs. 1,000. On the same day the rights and interests of the judgment-debtor in a mauza called Khanpur were put up for sale in the execution of Sangam Ram's decree, and were purchased by him for Rs. 700, and subsequently, on the same day, such rights and interests were again put up for sale in satisfaction of the balance of Behari Bhagat's decree for Rs. 5,151-15-6, stated in the notification of sale to be Rs. 1,964, and were purchased by the plaintiff for Rs. 50. Sangam Ram objected to the confirmation of the sale to the plaintiff on the ground that, inasmuch as the proceeding of the 18th July, 1876, showed that a sum of Rs. 1,107 only was due on account of that decree, and Hardya had been sold for Rs. 1,000, a balance of Rs. 107 was all that was due on account of that decree, and not, as stated in the notification of sale, a balance of Rs. 1,964. The Court on

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the 9th May, 1877, set aside the sale to the plaintiff on the ground that the decree for Rs. 5,151 had been satisfied. The plaintiff thereupon instituted the present suit against Sangam Ram in which he claimed that the sale to him of Abadi Bogam's rights and interests in Khanpur of the 20th November, 1876, might be confirmed, that the order of the 9th May, 1877, might be set aside, and that he might obtain possession of those rights and interests. The Court of first instance dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree, holding, with reference to the contention of the defendant that an order setting aside a sale in the execution of a decree was final, and a suit to contest such an order was not maintainable, that a suit to contest such an order was maintainable where the order was irregular, and that the order of the 9th May, 1877, was irregular.

On appeal to the High Court the defendant again contended that the suit was not maintainable.

Pandit *Ajudhia Nath* and Babu *Baroda Prasad Ghose*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondent.

The Court (STUART, C J. and OLDFIELD, J.) delivered the following

JUDGMENT.—The father of plaintiff held two decrees against the same judgment-debtor, one for Rs. 1,812-2-10, the other for Rs. 5,151-15-6. He took out execution of the decree for the larger amount, and privately out of Court bought a property of the judgment-debtor for Rs. 4,000; and on an application made by the defendant-appellant, who held a decree against the same judgment-debtor, this sum was set-off against the plaintiff's larger decree. There was another sale of property of the judgment-debtor made for Rs. 1,000, and this was also set-off against the larger decree of plaintiff, leaving Rs. 107 or thereabouts due. But plaintiff and the judgment-debtor moved the Court executing the decree to set-off all these payments in the first instance against the smaller decree, and this was ordered to be done by the Court; the sum remaining due on the larger decree would be Rs. 1,914 or thereabouts. The plaintiff then took out execution of this larger decree,

and defendant-appellant at the same time executed his decree. There were two sales of two villages belonging to the judgment-debtor, and one of these villages, Khanpur, was sold in execution of defendant-appellant's decree and bought by defendant-appellant for Rs. 700, and later on, on the same day, sold in execution of plaintiff's decree, and bought by him for Rs. 50. The defendant-appellant objected to the second sale, and it was set aside on the ground that the plaintiff's decree then in execution had been satisfied by reason of the payments which, as above related, had been at defendant's instance set-off against it, but which had been afterwards written off against the plaintiff's smaller decree, and by the sale-proceeds of the sale to defendant. The plaintiff now brings this suit to have the sale confirmed to him and for possession of Khanpur. He also sued in respect of another village, but the appeal does not refer to that. The lower appellate Court has decreed the claim and defendant-appellant contests the finding.

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It appears to us that plaintiff is able to maintain a suit for the cancelment of the order setting aside the sale and for its confirmation in his favor, for that order was not one made under s. 257, Act VIII of 1859. The sale was set aside at the instance of a purchaser under another decree, because in the opinion of the Court the decree of plaintiff had been satisfied. Now, in examining the proceedings taken in execution of the plaintiff's decree, this finding of the Court executing the decree is erroneous. The previous payments had been set-off against the plaintiff's decree of smaller amount, and any order to the contrary effect, at the instance of a stranger, was clearly improper. So far therefore the order setting aside the sale in favor of plaintiff was unwarranted. The lower appellate Court's decree is so far modified by declaring plaintiff's right to have the sale confirmed in his favor and cancelling the order decreeing him possession.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GIRDHARI DAS (DEFENDANT) v. JAGAN NATH (PLAINTIFF).*

1880
August 2.

Promissory Note—Evidence—Act XVIII of 1869 (Stamp Act), ss. 39, 40.

A promissory note, not payable on demand, executed on unstamped paper, was brought to a Collector, under s. 39 of Act XVIII of 1869, for adjudication as to

* First Appeal No. 63 of 1878, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Agra, dated the 1st May, 1878.

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the proper stamp, who, upon the payments provided in that section having been made, made the endorsement thereon provided in that section. *Held* that the irregularity of the Collector in making such endorsement did not render such promissory note inadmissible in evidence.

THIS was a suit for Rs. 22,346, principal moneys, and Rs. 2,471-4-0, interest thereon, founded on an instrument called an "agreement" (*ikrār-nāma*). The plaint in the suit stated that on the 8th August, 1876, at Bindraban, Muttra district, the plaintiff, "through his guardian, mother, and friend Dhani, lent the defendant Rs. 22,346; that the latter caused to be written and completed by his seal and signature the agreement (*ikrār-nāma*), bearing three months' time, which is the basis of the claim, and delivered it to the plaintiff's mother; that the said amount was payable on the 8th November, 1876; and that the defendant had not paid the said amount." The instrument referred to in the plaint, which was dated the 8th August, 1876, was not stamped at the time of execution. Subsequently to its execution it was brought to the Collector in order that he might, under the provisions of s. 39 of Act XVIII of 1869, assess and charge the stamp-duty to which he considered it to be liable. The stamp-duty, and the penalty incurred through the instrument having been executed on unstamped paper, having been paid, the Collector certified by endorsement on the instrument that the proper stamp-duty had been paid. The certificate was in the following terms:—"To-day, the 5th October, 1877, Ram Prasad, mukhtār, deposited through Brij Mohan, mukhtār of Dhani, Rs. 82-8 0 on account of value of stamped paper; Rs. 412-8-0 on account of (fine) five times the aforesaid amount; and Rs. 5 on account of court fees, under s. 39 of Act XVIII of 1869; altogether Rs. 500, in the treasury: this verification has been written under s. 39 of Act XVIII of 1869, and this paper shall be considered to be of sufficient value."

The defendant set up as a defence to the suit that "the instrument forming the basis of the claim was not an agreement (*ikrār-nāma*) but a promissory note, and having been executed on unstamped paper was invalid, and that the proceedings of the Collector were invalid not being in accordance with law." The Court of first instance held that, under s. 39 of Act XVIII of 1869,

the instrument must be deemed duly stamped and receivable in evidence, by reason of the Collector's endorsement. It further held that the instrument was not a promissory note but a bond; and deciding the case on the merits in favor of the plaintiff gave him a decree.

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The defendant appealed to the High Court, contending, *inter alia*, "that, as the note upon which the suit was based originally bore no stamp, and could not be stamped afterwards, under the provisions of the law, it was not receivable in evidence, and the lower Court had erred in holding that it was not a promissory note, and in holding that, having been stamped subsequently to its execution, it could be received in evidence and acted upon."

Mr. Howard, and Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the respondent.

The judgment of the High Court (STUART, C. J., and OLDFIELD, J.), so far as it related to the above contention, was as follows:—

JUDGMENT.—The first objection taken in appeal is as to the inadmissibility of the note-of-hand on which this claim is based, in that it is a promissory note requiring a stamp; but, assuming for the present that the instrument is a promissory note, in our opinion, the objection fails with reference to the provisions of s. 39 of the Stamp Act, since it has been certified by endorsement made on the note by the Collector under s. 39 that the full duty with which it is chargeable has been paid. It is no doubt provided in s. 39 that this section does not authorize the Collector to make any such endorsement on promissory notes, yet an irregularity in making such an endorsement, the remedy for which will be by appeal or revision by the chief revenue authority under s. 40, will not prevent the admission of the document as evidence, for s. 39 specially provides that the instrument shall on endorsement be deemed to be duly stamped, and shall be receivable in evidence or otherwise in all Courts and public offices as if originally executed on paper bearing the proper stamp.

1880
August 2.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

RADHA KISHEN MAN (PLAINTIFF) v. BACHHAMAN AND OTHERS (DEFENDANTS).*

*Hindu law—Joint undivided Hindu family—Alienation by father—Right of son
—Partition—Grandmother—Appeal—Parties to suit.*

B, a member of a joint undivided Hindu family consisting of himself and his son *R*, as the manager of the family, borrowed moneys for lawful purposes and executed a bond for their repayment in which he hypothecated a share of mauza *B*, such share being ancestral property, as collateral security for their repayment, with the knowledge and approbation of *R*. The obligee of such bond sued *B* thereon and obtained a decree, which directed the sale of such share, and such share was put up for sale and was purchased by *C*. *R* subsequently sued *B* and his mother for partition of the family property, including such share, claiming a one-third share of such property. *C* was made a defendant in the suit, and so was *P*, *R*'s grandmother, who claimed to share equally with the other members of the family in such property. *Held* that it must be presumed that *B* was sued on such bond, and that the decree in such suit was made against him as the head of the family, and *R* could not recover from *C* the share of mauza *B*. *Held* also that *P* was not entitled on partition to a share of the family property.

On appeal to the High Court from the decree of the Court of first instance, *R* made respondents certain persons who after the passing of that decree had purchased at execution-sales the rights and interests of *B* in portions of the landed estate of the family. *Held* that, such persons not being affected by that decree, the Court could not make any order respecting their claims, and they had been unnecessarily made parties to the appeal.

THE plaintiff in this suit sued his father, Bachhaman, and his mother, to establish his right, according to Hindu law, by partition, to a one-third share of the ancestral property of the family, consisting of shares of villages (including a two-anna eight-pie share in a village called Bishenpur), houses, and a garden. The plaintiff stated in his plaint that on the death of his grandfather, his father's name was recorded in the revenue register in respect of such shares, the same at that time being unincumbered; that from the time his father's name was so recorded, his father commenced to create incumbrances on such shares, without lawful necessity, and without his knowledge; and that he was entitled, according to Hindu law, to have his legal share of the family property partitioned, inasmuch as if he continued to live in coparcenery with his father such share would be wasted. On the

* First Appeal, No. 66 of 1879, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 19th March, 1879.

29th October, 1878, Pareva, the plaintiff's grandmother, preferred an application to the Subordinate Judge, praying that, under s. 32 of Act X of 1877, she might be made a defendant in the suit, as she was entitled on partition of the family property to a one-fourth share by way of maintenance. On the same day, Ram Charitra, Parmeshri, and Jangli, who had purchased the two-anna eight-pie share of Bishenpura at a sale in the execution of a decree against the defendant Bachhaman, made a similar application. On the 18th December, 1878, the Subordinate Judge made an order adding these applicants as defendants in the suit. The decree, at the sale in execution of which the defendant Ram Charitra and his co-defendants purchased the share in Bishenpura, was passed against the defendant Bachhaman on the 13th May, 1876. It was passed in a suit against him on a bond for the payment of certain moneys, dated the 4th June, 1874, in which that share was hypothecated as collateral security for the payment of such moneys, and it enforced such hypothecation. The defendant Ram Charitra and his co-defendants set up as a defence to the suit that the plaintiff's right in such share had passed to them in virtue of their auction-purchase. In their written statement dated the 17th January, 1879, they stated as follows:—"The auction-purchase of the share in Bishenpura made by the defendant is valid: the plaintiff's father borrowed money in 1874, a decree was passed for the same, and the auction-sale took place in satisfaction thereof, and the defendants became the auction-purchasers: the debt was valid; a decree having been made for it, the objection as to its illegality is utterly untenable: the objection as to its being illegal ought to have been taken when it was incurred, and not after the decree and the auction-sale in satisfaction of a lawful debt: the claim of a son for the property sold by auction is by no means tenable: all the rights were conveyed by the sale in satisfaction of a just debt." In her written statement of the same date the defendant Pareva denied the plaintiff's right to a one-third share of the family property. She stated therein as follows:—"The defendant is the own grandmother of the plaintiff: the property sought to be divided by the plaintiff is ancestral: the right of plaintiff's grandmother to it is equal to that of the plaintiff's mother: the plaintiff claims one-third, but after deducting this defendant's share, the plaintiff can

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be entitled to a quarter thereof : according to the rules of the Hindu law, this defendant is entitled to her maintenance out of the ancestral property, which cannot be divided without paying her maintenance : in lieu of her maintenance, a share ought to be assigned to her like that assigned by the plaintiff to his mother."

The Subordinate Judge gave the plaintiff a decree in respect of one-fourth of the family property, with the exception of the share in Bishenpura, holding, with reference to that share, that it had been sold in satisfaction of a family debt, and the plaintiff could not claim any right in it; and, with reference to the claim of the defendant Pareva, that the whole family should be supported out of the family property, and she was therefore entitled to a one-fourth share of it.

The plaintiff appealed to the High Court, making respondents in addition to the persons who had been defendants in the suit in the Court of first instance, certain persons who had purchased at execution-sales the right, title, and interest of the defendant Bachhaman in other villages comprised in the family property subsequently to the passing of the decree of the Court of first instance. It was contended on behalf of the plaintiff that the debt in satisfaction of which the share in Bishenpura had been sold had been contracted by his father for immoral purposes; that his father's right, title, and interest only had passed to the auction-purchasers; and that his grandmother, the defendant Pareva, was not entitled to a specific share of the family property, but only to be maintained therefrom.

Lala Lalta Prasad and *Maulvi Mekdi Hasan*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Pandit Ajudhia Nath*, for the respondents.

The judgment of the Court (*STUART, C. J.*, and *OLDFIELD, J.*) was delivered by

OLDFIELD, J.—The property in suit belonged to one *Khem Narain Man*; the plaintiff is his grandson, and defendants Nos. 1, 2, and 3 are respectively his son and father of plaintiff, his widow, and mother. The plaintiff seeks to recover by partition one-third as his legal share of his grandfather's estate, comprising shares in

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nine villages, two houses, and one grove. The defendants Nos. 4, 5, and 6 are auction-purchasers of the share in Bishenpura, one of the villages, which they bought before this suit was instituted in execution of a decree against Bachhaman, defendant, plaintiff's father; and they urge that the sale conveyed to them all the rights in the property, including the plaintiff's. The respondents Nos. 7 to 11 are purchasers of some of the property, but they made the purchase after the decree of the lower Court in this suit was passed, and the plaintiff has joined them in this appeal as respondents, but no question respecting them arose or was determined before the lower Court. The lower Court has found that the business of plaintiff and his father Bachhaman was joint; the latter borrowed on account of both, and the property purchased by defendants Nos. 4, 5, and 6 should be excluded from this claim, because the debt in satisfaction of which it was sold was incurred to meet expenses of the plaintiff as well as his father when they carried on business jointly, and plaintiff benefited thereby; and it holds that in consequence the decree in execution of which the sale took place does affect the plaintiff; and the Court excludes Bishenpura from the claim, and decrees in favor of plaintiff to the extent of one-fourth in respect of the rest of the property. The second to the fifth objections taken in appeal are invalid. This case is distinguishable from that of *Deendyal Lal v. Jugdeep Narain Singh* (1) by the circumstance that in this case the respondents, auction-purchasers, were no parties to the bond or the decree in execution of which they became auction-purchasers: and this case, on the other hand, is similar to that of *Muddun Thakoor v. Kuntoo Lal* (2), which is an authority, as their Lordships have pointed out in *Suraj Bunsî Koer v. Sheo Persad Singh* (3), for the following propositions:—

(i) That, where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show

(1) I. L. R., 3 Calc., 193.

(2) L. R., 1 Ind. Ap., 321; 14 B. L. R., 137.

(3) I. L. R., 5 Calc., 143.

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that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and (ii) that purchasers at an execution-sale, being strangers to the suit, if they have not had notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

In the case before us, it is clear from the evidence that the father, Bachhaman, was acting as manager of the joint family when he executed the bond, the same being known to and approved by the plaintiff, and that the debt was incurred for necessary purposes; and it is presumable that Bachhaman was sued and the decree passed against him in his representative capacity on the bond. The plaintiff cannot, under these circumstances, recover from the auction-purchasers the share in Bishenpura which has passed to them under the auction-sale.

But the lower Court is wrong in giving the plaintiff's grandmother a share on partition. The plaintiff is entitled to a one-third share of the property with the exception of Bishenpura. So far the decree will be modified. The plaintiff will pay the costs of respondents Nos. 4, 5, 6, 7, 8, 9, 10, and 11, and his own costs of this appeal.

This Court can make no order as to any claim on the part of those respondents who became purchasers of some of the property after the decree was passed in this suit by the Court below; they are not affected by the decree, and were unnecessarily made respondents and must have their costs.

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August 4.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

PUSI (DEFENDANT) v. MAHADEO PRASAD AND ANOTHER (PLAINTIFFS).*

Husband and wife—Liability of husband for wife's debts.

A husband (Hindu) is not liable for a debt contracted by his wife, except where it has been contracted under his express authority, or under circumstances of such pressing necessity that his authority may be implied.

* Second Appeal, No. 339 of 1880, from a decree of Babu Aubinash Chandar Banarji, Subordinate Judge of Farukhabad, dated the 26th January, 1880, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 30th September, 1879.

A wife and her husband's brothers jointly executed a bond for the repayment of moneys borrowed to pay a debt due by her husband and his brothers and to carry on the cultivation of lands held by her husband and his brothers, and hypothecated the family-house as collateral security for the repayment of such moneys. Held that the wife was not justified in borrowing money to pay her husband's debt, and the want of money for cultivation of his lands would not justify her in pledging his credit for a joint loan taken by his brothers in which his liability would extend to the whole debt, nor would it justify her hypothecating his property, and the husband and his property were therefore not liable for the bond-debt.

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On the 1st January, 1875, one Chandan, his brother Khuji, and Parmi, the wife of their brother Pusi, members of a joint Hindu family, gave the plaintiffs in this suit a joint bond for the payment of certain moneys, in which they hypothecated the family house as collateral security for the payment of such moneys. This bond was executed by Parmi "as heir and in possession of the property of her husband." It recited that the moneys due thereunder had been borrowed to pay a family debt and to carry on the cultivation of lands held by the family. At the time the bond was executed Pusi was absent from his home, and had been absent from it about one year. The plaintiffs in this suit sued upon this bond, claiming not only as against the executants of it, but also as against Pusi and his share of the family house. Pusi had returned to his home after an absence of three years. The Court of first instance, on the 25th March, 1879, dismissed the suit as against the defendant Pusi on the ground that he had not executed the bond. On appeal by the plaintiffs the lower appellate Court, on the 13th May, 1879, remanded the case for re-trial with reference to the question whether the bond-debt had been contracted for family purposes, and for the benefit of the defendant Pusi, holding that if it had been so contracted the defendant Pusi and his property were liable for it. The Court of first instance held that the bond-debt had not been so contracted, and again dismissed the suit as regards the defendant Pusi. On appeal by the plaintiffs the lower appellate Court held that the bond-debt was contracted to pay a debt due by the defendant Pusi and to carry on the cultivation of his lands; and gave the plaintiffs a decree against the defendant Pusi and his one-third share of the family house.

The defendant Pusi appealed to the High Court, contending that he was not liable on the bond.

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Pandit *Ajudhia Nath* and *Munshi Ram Prasad*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

The judgment of the Court (PEARSON, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—It appears that the appellant's wife, during appellant's absence from home, joined with his brothers in execution of a bond by which they borrowed money from plaintiffs and hypothecated property belonging to appellant. Respondents sued not only the obligors but also appellant, and claimed to make him liable in person and property jointly with the obligors for the whole debt; and the lower appellate Court has allowed the claim on the ground that the husband is liable for the debt contracted by the wife. This liability, however, cannot be imposed, except when the wife has had express authority from the husband, or under circumstances of such pressing necessity that the authority may be implied. There was of course no express authority here, for the bond shows that the wife acted in her own right, as heir to a husband whom she believed or pretended to believe to be dead. The plaintiffs must show that the money was borrowed under circumstances of pressing necessity before they can make the appellant in any way liable. The lower appellate Court relies on the terms of the bond itself, which show that the money was borrowed to pay an instalment of a debt due by the appellant and to obtain money for expenses of cultivation. The first item is clearly not one which could justify the wife in borrowing money; and in regard to the other, there is nothing to show that money was in fact required for the expenses of cultivating her husband's lands, or that she personally received any money on that account. Moreover, the want of money would not justify her in pledging her husband's credit for a joint loan taken by his brothers, in which the liability of her husband would extend to the whole debt, nor would it possibly justify her mortgaging his property. It may be noticed also that plaintiffs dealt with the lady as making the disposal of the property in her own right, and not looking in any way to the husband as responsible for the debt. The circumstances, as we understand them, did not justify the plaintiffs in thus dealing with the lady, for the appel-

lant had not been a year absent from his home when the debt was contracted, and he appears to have gone only to the neighbouring district of Bareilly. It is only now since his return that they seek to enforce a liability which never entered into their consideration at the time they lent their money. The appeal is decreed by exempting appellant and his property from liability, and he will have his costs in all Courts.

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PURI
v.
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PRASAD.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

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August 6.

DARSU PANDEY AND ANOTHER (PLAINTIFFS) v. BIKARMAJIT LAL AND ANOTHER (DEFENDANTS) *

Hindu law—Alienation of joint undivided family property by Father—Rights of sons.

Z, a member of a joint Hindu family consisting of himself and his sons, in January, 1869, in order to raise money to pay off family debts and for family necessities, conveyed a two-anna share out of an eight-anna share of a village belonging to the family to B, who sued him on such conveyance for possession of the two-anna share and obtained a decree, and possession of such share. In June, 1879, the sons and the grandson of Z sued B to recover such share. *Held*, with reference to the ruling of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh* (1), that the suit was not maintainable.

This was a suit by the two sons and the grandson of one Zauk Lal for possession of a two-anna share out of an eight-anna in a certain village. This eight-anna share was joint ancestral property, and a two-anna share of it had been transferred by sale to the defendants in this suit by Zauk Lal by an instrument dated the 11th January, 1869. In this instrument Zauk Lal described himself as the owner of the eight-anna share, and the instrument recited that the purchase-money, which purported to be Rs. 1,199, was required for the payment of debts and for family necessities. The defendants sued Zauk Lal upon this instrument for possession of the two-anna share, and on the 17th June, 1869, Zauk Lal having confessed judgment, obtained a decree. The defendants subsequently obtained possession of the two-anna share, and after that event Zauk Lal died. The present suit was instituted on the 2nd June, 1879. The plaintiffs claimed the two-anna share and the cancelment of the sale-deed of the 11th January, 1869, on the ground, amongst

* Second Appeal, No. 430 of 1880, from a decree of D. M. Gardner, Esq., Judge of Gorakhpur, dated the 3rd February, 1880, reversing a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 16th September, 1879.

(1) I. L. R., 5 Calc., 148.

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others, that the sale was made without lawful necessity and without consideration. They stated as follows:—"According to Hindu law, this act of the plaintiffs' ancestor cannot be valid without the acquiescence of the plaintiffs, as the said ancestor and the plaintiffs had equal shares, according to Hindu law, in the ancestral property, the transfer by the ancestor without necessity and without consideration is quite illegal." The defendants set up as a defence to the suit, *inter alia*, that Zauk Lal was "the sole master and manager of business, that the plaintiffs carried on business and lived jointly with him, that it was on the advice of his sons that Zauk Lal executed the deed of sale for a legitimate purpose; and that the plaintiffs had benefited by the consideration-money." They also set up as a defence to the suit that Zauk Lal had not transferred to them more than his legal share of the ancestral property, and that he was competent to transfer such share.

The Court of first instance dismissed the suit for reasons which it is not material to state. On appeal by the plaintiffs the lower appellate Court fixed the following issues for trial, amongst others, viz., "(i) Is there any proof that the plaintiffs were parties to the sale: (ii) Is their acquiescence to be inferred from their not sooner bringing suit: (iii) Was there necessity for the sale: (iv) Had the plaintiffs' father a right to dispose of his own share." The decision of the lower appellate Court on these issues was as follows:—"On the next issue there is no proof whatever that the plaintiffs were parties to this sale: if they were parties, why were not their names conjoined; if they were present, as one of the witnesses attesting the deed affirms, why did not the vendee get them to attest as witnesses: it was surely his business not to pay away his money unless upon a deed which he knew to be valid. With regard to acquiescence of plaintiff, the case of *Duleep Singh v. Sree Kishoon Panday* (1) brought forward by the appellant's pleader and other decisions of the High Court show that, where a period of limitation has been fixed by law for bringing a suit, acquiescence is not to be inferred by the parties not bringing a suit at some earlier period. On the next issue, the necessity of sale, the case of *Nathu Lal v. Chadi Sahi* (2) above quoted and of *Bheknarain*

(1) H. C. R., N.-W. P., 1872, p. 83. (2) 4 B. L. R., A. C., 15.

Singh v. Januk Singh (1) show that the purchaser is bound to make inquiries and ascertain necessity, which seems to imply that he must be in possession of some means of subsequently proving the necessity should it be denied ; but so far is that from being proved in this case, that the lower Court itself thought the consideration itself could not be proved. In the deed itself the declaration of necessity is of the vaguest kind ; there is said to have been an old bond of two years previously for Rs. 383, borrowed for what purpose is not stated, and the remaining Rs. 815 is said to be for debts due to mahājans and for private expenses. Yet even the witnesses of the bond do not know who these mahājans were or what were their claims, nor is this anywhere stated in the record ; and the absence of mention in the registration of the payment of the money makes it doubtful whether it ever passed. On the whole, therefore, there is a presumption that the lawful necessity for the transfer did not exist. On the last point for determination, a recent decision of the High Court in *Chamaili Kuar v. Ram Prasad* (2) is so distinct and strong that it leaves no room for further discussion, and is to effect as follows :—On the power of a father to alienate ancestral property,—‘There is a current of decisions of this (the Allahabad) High Court invalidating sales by one coparcener without the consent, express or implied, of the other coparceners,’—and the Hon’ble Judge adds:—‘I have not been able to find any case where a voluntary sale was held valid to the extent of the seller’s own interest.’ Under these circumstances, I reverse the whole decision of the Subordinate Judge, and decree for appellants against respondents for possession of the two-anna share claimed, with costs throughout.”

The defendants appealed to the High Court, contending that the debts to pay off which the alienation had been made had not been contracted for immoral purposes, and therefore the alienation could not be set aside ; and that the plaintiffs had assented to the alienation and could not dispute its validity.

Shaikh Maula Bakhsh, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Shah Asad Ali*, for the respondents.

(1) I. L. R., 2 Calc., 438

(2) I. L. R., 2 All., 267.

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The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

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OLDFIELD, J.,—It appears that Zauk Lal executed a deed of sale in favor of defendants on the 11th January, 1869, of a two-anna share out of an eight-anna share of property belonging to the family. The defendants obtained a decree on the 17th June, 1869, and were put in possession. Zauk Lal then died, and the plaintiffs, who are his sons and grandsons, have instituted this suit in 1879, ten years after the defendants obtained their decree, to recover the property and cancel the sale. The first Court dismissed the suit: the Judge has decreed the claim, holding that plaintiffs were not parties to the sale, and that the evidence shows a presumption that lawful necessity for the transfer did not exist, and that under such circumstances the sale is invalid even to the extent of the seller's own interest.

This decision is open to some of the objections taken in appeal. The Judge is right in his view that one co-parcener cannot alienate the joint family property without the consent of the others, but he has overlooked the circumstances in this case which render the above rule inapplicable so as to permit the plaintiffs to recover the property from the defendants. The law which applies here to the case of sons claiming to recover property sold by their father has been explicitly laid down in the recent decision of the Privy Council in *Suraj Bansi Kuer v. Sheo Persad Singh* (1), "that, where joint ancestral property has passed out of the joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover the property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." In this case the deed of sale recites that the money was required to pay off debts and for family necessities, and there is no reason whatever to doubt this was the *bonâ fide* character of the sale, considering the plaintiffs' long acquiescence in the undisturbed possession of the defendants, nor is there even an assertion that the

(1) I. L. R., 5 Calc., 148.

money was required for immoral purposes, or that defendants had notice of the fact. Under such circumstances the plaintiffs are not in a position to succeed in their suit. We decree the appeal and reverse the decree of the lower appellate Court and restore that of the first Court which dismissed the suit with all costs.

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Appeal allowed.

CRIMINAL JURISDICTION.

1880
August 7.

Before Mr. Justice Pearson.

EMPRESS OF INDIA v. GURDU AND ANOTHER.

Omission to prepare charge—Acquittal—Discharge—Revival of Prosecution—

Act X of 1872 (Criminal Procedure Code), ss. 216, 220, 293.

A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion any failure of justice. *Held*, with reference to s. 216 of Act X of 1872, Explanation I, that such omission did not invalidate the order of acquittal of such person and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence.

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of the order of Mr. J. Kennedy, Magistrate of the Ghazipur District, dated the 3rd June, 1880, convicting the petitioners of theft, an offence punishable under s. 379 of the Indian Penal Code, and sentencing them to rigorous imprisonment for four months. The petitioners were originally accused of the theft before a Magistrate subordinate to Mr. J. Kennedy. The Subordinate Magistrate, after taking the evidence of the witnesses for the prosecution and for the defence, on the 22nd April, 1880, without having prepared in writing a charge against the petitioners, determined the case in their favor. He concluded his judgment in the case in these terms:—"I find the accused, Gurdu and Birju, not guilty, and hereby acquit them." The District Magistrate, being of opinion that the Subordinate Magistrate had misappreciated the evidence against the petitioners, re-instituted proceedings against them, and, on the 3rd June, 1880, convicted them of the theft. In his judgment the District Magistrate

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expressed his opinion that the order of the Subordinate Magistrate was not, with reference to s. 220 of Act X of 1872, an order of acquittal, but an order of discharge, inasmuch as the Subordinate Magistrate had omitted to prepare in writing a charge against the petitioners; and that such order, therefore, did not bar the revival of the prosecution of the petitioners.

The grounds on which revision was sought were that the omission of the Subordinate Magistrate to prepare in writing a charge against the petitioners did not invalidate his order of acquittal, and that, as the petitioners had been previously acquitted of the theft by a competent Magistrate, the Magistrate of the District had no jurisdiction to try them again for that offence.

Mr. Colvin, for the petitioner.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

PEARSON, J.—The proceedings of the Officiating Magistrate of the District are altogether unwarrantable. The basis of them was an application made to him under s. 298, Act X of 1872; but under the provisions thereof, if he was of opinion that the Deputy Magistrate's judgment or order was contrary to law, or that the punishment awarded by that officer was too severe or inadequate, the proper course was to report the proceedings for the orders of the High Court. But that section does not authorize the Magistrate himself to set aside the sentence of a subordinate Court, or recognize as a ground of interference a difference of opinion as to the value of the evidence recorded in the case.

The Officiating Magistrate is also wrong in holding that the accused had not been acquitted by the Deputy Magistrate on the charge on which he has tried them. The Deputy Magistrate's judgment of the 22nd April last concludes with these words:—"I find the accused Gurdu and Birju not guilty and hereby acquit them." The Magistrate, in advertence to the Explanation given under s. 220 of the Code wherein it is said that "if no charge is drawn up, there can be no judgment of acquittal or conviction," holds the Deputy Magistrate's judgment not to be a legally valid judgment of acquittal, because no charge was drawn up in the

case disposed of by the latter. But the rule that, if no charge is drawn up, there can be no judgment of acquittal or conviction, is subject to the exception of cases provided for in Explanation I to s. 216 of the Code. That Explanation is that the omission to prepare a charge shall not invalidate a charge, if in the opinion of the Court of appeal or revision, no failure of justice has been occasioned thereby. In the case decided by the Deputy Magistrate, although a charge may not have been formally drawn up, the accused were called upon to answer to the charge preferred against them by the complainants. There is no pretence for saying that any failure of justice was occasioned by the omission to draw up a formal charge; nor was that the ground on which the application under s. 298 was preferred to the Officiating Magistrate, or on which he proceeded to retry the accused. The alleged misappreciation of evidence by the Deputy Magistrate was the ground of the Officiating Magistrate's proceedings. Those proceedings being illegal by reason of the previous acquittal of the accused on the same charge are hereby cancelled, the sentence passed by the Officiating Magistrate on the petitioners is annulled, and their immediate release is ordered.

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APPELLATE CIVIL.

 1880
August 3.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AMAR NATH, GUARDIAN OF LACHMI NARAIN, A MINOR (PLAINTIFF), v.
THAKUR DAS AND OTHERS (DEFENDANTS).*

Suit for specific moveable Property or for compensation—Court-fees—"Multifarious Suit"—Act VII of 1870 (Court Fees Act), s. 7, cl. i, and s. 17.

A, to whom a certificate of administration in respect of the property of a minor had been granted in succession to B, whose certificate had been revoked, sued B claiming the delivery of specific moveable property of various kinds belonging to the minor, which had been intrusted to B and B detained, or the value of each kind of property as compensation in case of non-delivery. Held that the suit did not embrace "distinct subjects" within the meaning of s. 17 of the Court Fees Act, 1870, and the court-fees payable in respect of the plaint in the suit should be computed, under cl. i, s. 7 of that Act, according to the total value of the claim.

* First Appeal, No. 64 of 1880, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 30th January, 1880.

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v.
THAKUR DAR.

THE plaint in this suit, which was instituted in the Court of the Subordinate Judge of Saharanpur, stated that one Lachmi Narain, a minor, was the owner of the moveable property described in the schedule annexed to the plaint; that Bal Kuar, defendant No. 1, had been granted a certificate of administration to the property of the minor, the defendants Nos. 2, 3, and 4 giving security for the delivery of the minor's property by the defendant No. 1 when required by the District Court; that on discovering that the defendant No. 1 was acting dishonestly in the discharge of her duties, the plaintiff applied for the revocation of the certificate to her and for the grant of a certificate to himself, and the District Court, on proof of the dishonesty of the defendant No. 1, on the 31st March, 1879, revoked the certificate granted to her and granted a certificate to him; that the District Court ordered the defendant No. 1 to make over the property of the minor to the plaintiff, but she objected to make over the property described in the schedule annexed to the plaint, and the Court disallowing her objections on the 31st May, 1879, directed the plaintiff to sue for such property or compensation for its detention; and that the cause of action for the recovery of such property arose on that date, and for compensation on the 17th January, 1879. The plaintiff prayed accordingly "that Rs. 29,709-14-0 in cash, and Rs. 2,376 damages, total Rs. 32,085-14-0, after deducting Rs. 2,783-11-3½, the amount of expenditure, under the order of the Court; Rs. 25,000 the amount of the bills of exchange; the gold ornaments entered in the list, or Rs. 1,439-4-0; mercantile goods entered in the list, or Rs. 331-11-0 their value; miscellaneous articles entered in the list, or Rs. 318-12-9 their value; utensils entered in the list, or Rs. 218-9-3, their value; articles of daily use entered in the list, or Rs. 9-3-3, their value; Rs. 12,138-13-3 realized from debtors by Bal Kuar in part of Rs. 97,022-7-0, the debts due under account-books, together with Rs. 971 damages; grain entered in the list, or Rs. 1,432-12-6, its value; deeds of mortgage and bonds (44 in number) for Rs. 17,741-8-0, or the said amount; 11 deeds of sale and deeds of gift for Rs. 2,288-7-6 entered in the list, or Rs. 500 damages; in all Rs. 70,167-10-0 be directed to be paid to the plaintiff by the defendant." With reference to s. 7, cl. i, of the Court Fees Act, 1870, the plaintiff paid in respect of his plaint an institution

fee of Rs. 1,300 computed according to the total amount of the claim, viz., Rs. 70,167-10-0. The Subordinate Judge was of opinion that under s. 17 of that Act the plaint was chargeable with the aggregate amount of fees to which the plaints in separate suits for the different items of the claim would have been liable, such amount being Rs. 3,167; and he directed the plaintiff to supply the deficiency within a certain time. The plaintiff having failed to supply the deficiency as required, the Subordinate Judge made an order rejecting the plaint. The grounds on which the Subordinate Judge decided that the institution-fee should be computed according to the provisions of s. 17 of the Court Fees Act were as follows:—"Having taken the petition of plaint into consideration, I see that the plaintiff's claim is for the recovery of cash, damages, amount of bills of exchange, jewelry, mercantile goods, utensils, deeds of mortgage, sale, &c., and for the money which Bal Kuar realized from the debtors by means of the account-books, and such being the case, the claim involves several causes of action—vide s. 17, Act VII of 1870. This case is similar to the precedent quoted in the margin."—*Chamaili Ráni v. Rám Dái* (1).

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The plaintiff appealed to the High Court.

Pandits *Bishambar Nath* and *Ajudhia Nath*, for the appellant.
Mr. *Leach*, for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—We are of opinion that the court-fees were properly paid on the amount of the claim, Rs. 70,167-10-0, under cl. i, s. 7 of the Court Fees Act, and that s. 17 of the Act does not apply. It has been ruled by the Full Bench of this Court in *Mul Chand v. Shib Charan Lal* (2) that the meaning of that section is that distinct subjects are to be separately chargeable with court-fees, as being claims or causes of action which have been united in one suit for the purposes of jurisdiction or convenience of procedure. The claim in this suit does not embrace distinct subjects in the above sense. It is for the recovery of money and various articles left in the custody of one of the defendants, for whom the other defend-

(1) I. L. R., 1 All., 552.

(2) I. L. R., 2 All., 676.

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ants became sureties, and the equivalent in value of the articles as damages is sought as an alternative relief. There is but one and the same cause of action in respect of the matter to which the suit relates. We reverse the order of the lower Court and allow this appeal with costs, and direct the Subordinate Judge to restore the case on the register and dispose of it on the merits.

Cause remanded.

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August 9.

Before Mr. Justice Oldfield and Mr. Justice Straight.

SIBTA (DEFENDANT) v. BADRI PRASAD AND OTHERS (PLAINTIFFS).*

Hindu Law—Daughter's Son—Succession.

According to Mitakshara law a daughter's son takes his maternal grandfather's estate as full proprietor, and on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather. His *gotraja-sapindas*, or the persons related to him through his father, have, therefore, preferential right to succeed him to the persons related to him through his mother.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellant.

Messrs. *Conlan* and *Chatterji*, for the respondents.

The High Court (OLDFIELD, J., and STRAIGHT, J.,) made the following order remanding the case :—

OLDFIELD, J.—The property in suit belonged to one Chotey Lal : at his death it descended to his widow Chandan Kuar, and at her death to Nand Lal, the son of Chotey Lal's daughter. He was succeeded by his widow Inda ; and she died on the 29th August, 1878, having executed a deed of gift in favour of the appellant, Sibta, one of the defendants. The plaintiffs are related to Nand Lal through his mother the daughter of Chandan Kuar, and they claim the property by setting aside the deed of gift. The defence on the part of Sibta is that Nand Lal, who had absolute power over the property, made a will by which he bequeathed it absolutely to Inda, who made a gift of it to the defendant, and the plaintiffs have

* Second Appeal, No 1132 of 1879, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 12th April, 1879, affirming a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 19th December, 1878.

no right in the presence of the nearer heirs of Nand Lal. The Judge has affirmed the decree of the Court of first instance which decreed the claim on the ground that Nand Lal, as the son of Chotey Lal's daughter, did not succeed as full owner of the property, but had only a life-interest, and in the same way his widow Inda took only a life-interest, and at their death the heirs will be the plaintiffs, the *gotraja-sapindas* of Chotey Lal; and the Judge made no finding as to the *factum* of the will in favour of Inda by Nand Lal, or the genuineness of the deed of gift by Inda in favour of the appellant, it being unnecessary to do so on his finding that Nand Lal and Inda had but limited interests and no power to make such bequests.

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The Courts below have, however, erred in holding that Nand Lal had only a limited interest. On the contrary, as the son of Chotey Lal's daughter, he took the inheritance as full owner; and on his death the succession would pass to his heirs and not to the heir of his maternal grandfather Chotey Lal.—*Mitakshara*, Chap. ii, s. 2, v. 6; and *Mayne's Hindu Law*. If therefore there are any heirs of Nand Lal alive among his *gotraja-sapindas*, that is, related to him through his father, as appellant asserts, they will have a preferential right of succession over plaintiff, who in that case cannot maintain the suit. We direct the Judge to try the issue indicated, and if he finds that there are no such *gotraja-sapindas* of Nand Lal alive, he will further try the issues in respect of the genuineness and validity of the alleged testamentary bequest by Nand Lal in favour of Inda and of the gift by the latter in favour of the appellant. We remand the case accordingly, and allow ten days for objections to be preferred to it.

Cause remanded.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

NARAIN DAS (JUDGMENT-DEBTOR) v. LACHMAN SINGH (DECREE-HOLDER).*

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August 10.

Pre-emption—Execution of Conditional decree.

The decree of the original Court in a suit to enforce a right of pre-emption, dated the 18th February, 1879, directed that, on the deposit of the purchase-money

* Second Appeal, No. 44 of 1880, from an order of F. E. Elliot, Esq., Judge of Mainpuri, dated the 28th April, 1880, affirming an order of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 6th March, 1880.

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within one month of the date on which the decree became final, the decree-holder (plaintiff) should obtain possession of the property in suit, and that, if the decree-holder failed to make such deposit within such period, the decree should become null and void. The vendee (defendant) preferred an appeal from this decree, which the appellate Court, on the vendee's application, struck off on the 18th September, 1879. *Held* that, assuming that the order of the appellate Court, by reason that it did not award costs to the decree-holder (respondent), might have been made the subject of a second appeal to the High Court, inasmuch as the decree of the 18th February, 1879, could not have been affected by the result of such an appeal, that decree became final on the 18th September, 1879, when the appeal from it was withdrawn and struck off, and not on the expiry of one month and ninety days from the date of the appellate Court's order of the 18th September, 1879.

THE decree in this case bearing date the 18th February, 1879, was made in a suit to enforce a right of pre-emption in respect of certain property. It directed that on the payment of the purchase-money into court within one month of the date of the decree becoming final, the plaintiff should obtain possession of the property, and that if the plaintiff failed to pay the purchase-money into court within the time fixed the decree should become null and void. The purchaser preferred an appeal from this decree which he subsequently abandoned before notice of the appeal had been served upon the respondent (pre-emptor) under an application, dated the 17th September, 1879. In that application he prayed that the appeal might be struck off, as the decree-holder (pre-emptor) had not up to that date paid the purchase-money into court and the decree had therefore become null and void. On the 18th September, 1879, the appellate Court ordered "that the case be struck off." On the 16th December, 1879, the decree-holder applied for the execution of the decree. He stated in his application as follows:—"The decree was passed on the 18th February, 1879, and directed that the plaintiff should obtain possession by depositing Rs. 1,475-11-0, the pre-emption amount, within one month from the date of the decree becoming final: subsequently an appeal was preferred by the vendee, and the 30th of September was fixed for hearing: the plaintiff-respondent filed a vakalat-nāma on the 1st September, 1879: the appellant made an application on the 18th September, 1879, to the appellate Court, without the knowledge and information of the respondent, to the effect that owing to the default of payment of the pre-emption amount .

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by the plaintiff the decree has become null and void, and that the appeal be struck off: that accordingly the case was struck off, but the respondent had no notice of this proceeding: he came to know of it on the 1st December, 1879: computing the term from the date of the decision of the appellate Court he deposits Rs. 1,475-11-0, and prays that he be put in possession." The Court executing the decree directed, as regards the purchase-money, that, as the Government treasury had closed for the day, the decree-holder should produce the purchase-money at the next sitting of the Court. The purchase-money was eventually paid into Court on the 3rd January, 1880. The judgment-debtor objected to the execution of the decree on the ground that the purchase-money had not been deposited within the time fixed by the decree, and the decree therefore had become null and void. The Court held that the purchase-money had been deposited within time, its reasons for so holding being as follows:—"The Court is of opinion that it has undoubtedly been so deposited, because the decision of the Court cannot become final until after expiry of the period for second appeal, which is ninety days, or until the disposal of the second appeal, if it be preferred. The money has been deposited within one month after expiry of ninety days. If the first appeal had not been preferred on the part of defendant the money ought to have been paid within one month after expiry of thirty days, but an appeal having been preferred, the case becomes different." On appeal by the judgment-debtor the lower appellate Court affirmed the order of the Court of first instance on the following grounds:—"The whole question turns upon whether there was any right of special appeal against the order striking off the appellant's suit or not. It appears that, although no notice had been issued to the respondent at the appellant's instance in the appeal in question, the former filed a vakalat-nāma and thus incurred costs which were not awarded to him. An appeal can lie as to costs, thus the respondent could appeal. The appeal is dismissed with costs."

On second appeal to the High Court the judgment-debtor contended (i) "that, when the decree-holder did not deposit the consideration-money within one month from the date of the decision becoming final, the decree has become inoperative; (ii) that the

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decision of the lower Court to the effect that, if the money be paid within one month from the date of the expiration of the time allowed for appeal, the payment is to be considered to have been made within time is not correct; (iii) and that, when the appeal was not decided by the Court but the appellant withdrew it himself, it is improper to rule that the decision did not become final till the expiration of the period allowed for appeal."

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the appellant.

Pandit *Ajudhia Nuth* and Munshi *Kashi Prasad*, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—In our opinion the Subordinate Judge's decree dated 18th February, 1879, became final on the 18th September following, when the appeal preferred to the Zila Judge from it by the vendee was withdrawn and struck off. The reason assigned by the lower appellate Court for thinking otherwise, *viz.*, that the decree-holder might have preferred a special appeal to this Court in respect of his costs which were not awarded to him by the order of the 18th September, 1879, appears to us to be bad: for an order striking off an appeal at the request of the appellant was not an order liable to special appeal, and, even if it could have been made the subject of appeal, it is obvious that the decree of the 18th February, 1879, in so far as it related to the substance of the suit, the right of pre-emption and the amount of the sale-price could not have been affected by the result of such an appeal. We must, therefore, rule that the sale-price deposited on the 3rd January last was not deposited within the time allowed by the decree, and cannot be accepted; and that the decree-holder is not entitled to be put or maintained in possession of the property the subject of the sale, which should be restored to the vendee. Accordingly we decree the appeal with costs by reversal of the order of the lower Courts and allow the objection of the judgment-debtor-vendee.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AMAR SINGH (JUDGMENT-DEBTOR) v. TIKA (DECREE-HOLDER).*

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August 10.

Execution of Decree—Application to enforce Decree—Oral application for proclamation of sale—Act IX of 1871 (Limitation Act), sch. ii, art. 167.

An oral application, on a sale of immoveable property in the execution of a decree having been adjourned, for the fixing of a fresh date for the sale is an application to enforce the decree, within the meaning of art. 167, sch. ii of Act IX of 1871. An application to enforce the decree made within three years from the date of such an oral application will therefore be within time.

The decree of which execution was sought in this case was a money-decree bearing date the 24th February, 1873. The first application for its execution was made on the 20th March, 1873. On that occasion certain immoveable property belonging to the judgment-debtor was attached, and was proclaimed for sale on the 20th May, 1873. The intended sale did not take place on that day, but was adjourned by the officer appointed to conduct it, by reason that no purchasers appeared. The report by that officer of his proceedings was laid before the Court executing the decree on the 30th May, 1873, which directed that the case should be brought before it on the 6th June, 1873. On that day the decree-holder applied orally for the issue of fresh proclamations of sale. The Court granted this application, and the property was proclaimed for sale on the 21st July, 1873. The sale was again adjourned by the officer appointed to conduct it for the same reason as it had previously been adjourned. The case was brought before the Court, with the report of the officer appointed to conduct the sale, on the 30th July, 1873, when the decree-holder again applied orally for the issue of fresh proclamations of sale. This application was granted, and the property was proclaimed for sale on the 20th September, 1873. On that date the property was sold, the sale-proceeds only satisfying the decree in part, and on the 25th November, 1873, the execution-case was struck off the pending file. On the 29th June, 1876, the decree-holder again applied for the execution of the decree. The notice to the judgment-debtor to show cause why the decree should not be executed required by s. 216.

* Second Appeal, No. 40 of 1880, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 17th April, 1880, reversing an order of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 1st May, 1879.

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of Act VIII of 1859 was issued, but the execution-proceedings were subsequently struck off the file for default on the 30th August, 1876, the decree-holder having failed to pay certain process-fees. On the 4th March, 1879, the decree-holder made the present application for the execution of the decree. The judgment-debtor objected that the execution of the decree was barred by limitation, the application of the 29th June, 1876, not having been made within the time allowed by law. The Court of first instance held, applying the Limitation Act of 1871, that the application of the 29th June, 1876, was not within time and execution of the decree was barred by limitation. On appeal the lower appellate Court held that that application was within time, and the execution of the decree was not barred, on the ground, amongst others, that that application was made within three years from the oral application of the 30th July, 1873, which was a proceeding to enforce the decree.

The judgment-debtor appealed to the High Court contending that the oral application of the 30th July, 1873, was not one from which the limitation under Act IX of 1871, which was the limitation law applicable, could be computed, not being an application to enforce the decree within the meaning of art. 167, sch. ii. of that Act.

Pandit *Nand Lal*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—The applications of the 30th May, 1873, and of the 29th June, 1876, were, in our opinion, governed by the Limitation Law of 1871. We are further of opinion that the oral applications made to the Court on the 6th June and 30th July, 1873, to fix fresh dates for the sale were applications to enforce the decree within the meaning of art. 167, sch. ii. of that law. The application of 29th June, 1876, was within three years from the 30th July, 1873, and was therefore within time. The appeal fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH.

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August 10.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

RUP KUARI (JUDGMENT-DEBTOR) v. RAM KIRPAL SHUKUL (DECREE-HOLDER)*

Execution of Decree—Res judicata—Act X of 1877 (Civil Procedure Code), ss. 13, 647.

Held by the Full Bench that the law of res judicata does not apply in proceedings in execution of decree.

Held, therefore, by the referring Bench, where on an application for the execution of a decree the question was raised whether the decree awarded mesne profits or not, and the Court executing it determined that it did not award mesne profits, that such determination was not final, but such question was open to re-adjudication on a subsequent application for execution of the decree.

THE decree of which execution was sought in this case was a decree of the Sudder Dewany Adawlut, North-Western Provinces, dated the 23rd June, 1864, which reversed a decree of the District Judge of Gorakhpur, dated the 23rd April, 1863, and restored a decree of the Principal Sudder Amin of Basti, dated the 12th June, 1862. Application for the execution of the decree had been made in 1867, the decree-holder then seeking to recover the mesne profits of the property of which the decree awarded him possession accruing between the date of the suit and the date that possession was delivered to him. The judgment-debtor objected to this application upon the ground, amongst others, that the decree-holder was not entitled to such mesne profits, as the decree did not award them. The Court executing the decree (the Principal Sudder Amin) allowed this objection by an order dated the 29th April, 1867. On appeal by the decree-holder the District Judge (Mr. Probyn) on the 20th December, 1867, held that the decree awarded such mesne profits and that the decree-holder was therefore entitled to recover them. The present application for the execution of the decree, in which the decree-holder again sought to recover such mesne profits, was made on the 11th September, 1878. The judgment-debtor again objected that the decree did not award such mesne profits. The Court executing the decree (the Subordinate Judge) held that the decree awarded such mesne profits, and further that

* Second Appeal No. 83 of 1879 from an order of R. G. Currie, Esq., Judge of Gorakhpur, dated the 26th July, 1879, affirming an order of Hakim Rahat A. H., Subordinate Judge of Gorakhpur, dated the 10th May, 1879.

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this objection, having been disposed of by the District Judge's order of the 20th December, 1867, could not be raised again. On appeal by the judgment-debtor the District Judge also held that the decree awarded such mesne profits. On appeal by the judgment-debtor to the High Court it was contended on his behalf that the lower Courts had misconstrued the decree, and it did not award such mesne profits. On behalf of the decree-holder (respondent) it was contended that the question whether the decree did or did not award such mesne profits was, with reference to the decision of the 20th December, 1867, a *res judicata*, and could not be again raised. The Division Bench before which the appeal came for hearing (PEARSON, J., and OLDFIELD, J.) referred to the Full Bench the question "whether the law of *res judicata* applies in proceedings in execution of decree."

The Senior Government Pleader (Lala Juala Prasad), the Junior Government Pleader (Babu Dwarka Nath Banarji), and Babu Jogindro Nath Chaudhri, for the appellant.

Munshi Hanuman Prasad, Lala Lalla Prasad, and Maulvi Mehdi Hasan, for the respondent.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—I am quite clear that the law of *res judicata* has no application in proceedings in execution of decree, and I therefore answer this reference in the negative.

PEARSON, J. (STRAIGHT, J., concurring).—S. 13, Act X of 1877, embodies the law of *res judicata* and declares that "no Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, in a Court of competent jurisdiction, between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court."

Prima facie, the law above quoted refers only to matters decided in suits. It was suggested that the word "suit" might include all the proceedings in execution of the decree passed in the suit. But even on such a construction it could not be held that a matter decided in former execution-proceedings had been decided in

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a former suit, unless each application for execution of decree were regarded as a separate suit. That an application is a distinct thing from a suit in the language of Indian legislation is, however, conclusively proved by the provisions of the Law of Limitation. Proceedings in execution of decrees are included in the category of miscellaneous proceedings which are expressly distinguished from suits and appeals in s. 647 of the Procedure Code. That section enacts that the "procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals." It was suggested that, under the provisions of that section, the law of *res judicata* contained in s. 13 would apply to proceedings in execution of decree; but I cannot hold the law of *res judicata* to be procedure. I would, therefore, reply in the negative to the question on which our opinion has been asked.

OLDFIELD, J.—I am of opinion that the law of *res judicata* will not ordinarily apply to proceedings in execution of decree, and this seems to have been held by the Privy Council in the case of *The Delhi and London Bank v. Orchard* (1). I concur with Mr. Justice Pearson in replying in the negative to the question referred.

The Division Bench (PEARSON, J., and OLDFIELD, J.), on the case coming again before it for disposal, delivered the following judgment:—

PEARSON, J.—The Full Bench has expressed an unanimous opinion that the law of *res judicata* does not apply in proceedings in execution of decree. The question which the lower Courts held to be finally determined by Mr. Probyn's decision dated 20th December, 1867, is therefore open to re-adjudication by us; and on examining the terms of the late Sudder Court's decree, we are constrained to declare that mesne profits are not awarded by it. The execution of the decree for mesne profits must therefore be disallowed, and we need not consider any other matters. The appeal is decreed by reversal of the orders of the lower Courts: but, under the circumstances, we direct that the parties bear their own costs in all the Courts.

Appeal allowed.

(1) I. L. R., 3 Cal., 47; S. C., L. R., 4 Ind. Ap., 127.

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August 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BHAWANI GIR (PLAINTIFF) v. DALMARDAN GIR (DEFENDANT.)*

Lambardár and Co-sharer—Suit for arrears of revenue—Mortgagee—Act XVIII. of 1873 (N.-W. P. Rent Act), s. 93 (g)—Act VIII of 1879, ss. 11, 12—Jurisdiction.

Per STUART, C. J., and STRAIGHT, J.—The term ‘co-sharer’ in s. 93 (g) of Act XVIII of 1873 does not include the mortgagee of a co-sharer, and therefore a suit by a lambardár against the mortgagee of a co-sharer for arrears of Government revenue is not one which, under that section, is cognizable in a Court of Revenue, but is one which is cognizable in a Civil Court.

Per PEARSON, J., and OLDFIELD, J.—*Contra.*

THIS was a suit under s. 93 (g) of Act XVIII of 1873, in which the plaintiff claimed, as the lambardár of a mahál, Rs. 145-5-5, arrears of Government revenue, for the years 1284, 1285, and 1286 fasli, in respect of a four-anna share of such mahál. The defendant was the mortgagee of the four-anna share under a mortgage from the plaintiff, the owner of the share. The plaintiff mortgaged the share to the defendant in 1273 fasli for Rs. 900. Under the terms of the instrument of mortgage, the share was redeemable at the end of 1281 fasli, and the mortgagee was to hold possession of the share, paying the Government revenue and appropriating the profits of the share in lieu of interest on the mortgage-money. The plaintiff stated in his plaint in this suit that the defendant, notwithstanding he had collected the rents of the share for the years 1284, 1285, and 1286 fasli, had not paid the Government revenue payable in respect of the share for those years. On the issue whether the suit was cognizable in a Court of Revenue, the Assistant Collector trying it held that it was cognizable in a Court of Revenue, the defendant being the representative of a co-sharer. With reference to the merits of the suit, the Assistant Collector held that the defendant was not liable for the arrears of Government revenue claimed, as he had not been in possession of the share and had not collected the rents of it during the years for which such arrears were claimed. On appeal by the plaintiff the District Judge affirmed the decree of the Assistant Collector.

* Second Appeal, No. 338 of 1880, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 6th January, 1880, affirming a decree of Babu Chatardhari Thakur, Assistant Collector, dated the 6th October, 1879.

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to argue that ss. 11 and 12 of Act VIII of 1879 rather showed that, in the mind and intention of the Legislature, the revenue law previously enacted did not recognise any synonymous right in land-lord or proprietor and mortgagee, but that to make these different rights mean the same thing an express law had for that purpose to be passed. The sections in question, however, only provide that a mortgagee shall be deemed to be an owner or proprietor in a very partial sense. Thus s. 11 provides that a mortgagee shall only be deemed an owner as that term is used in s. 141 of Act XIX of 1873, that is, as being "bound to maintain and keep in repair at their own cost the boundary-marks lawfully erected" in maháls, villages, or fields; and under s. 12 a mortgagee in possession or a farmer is only to be understood as a proprietor within the meaning and application of s. 146 of Act XIX of 1873. In all other respects, as regards these two sections of Act VIII of 1879, a mortgagee remains such without any further rights.

The pleader for the plaintiff-appellant referred us to the definition of land-holder in the Rent Act XVIII of 1873, as "the person to whom the tenant is liable to pay rent." This was a plausible and allowable argument, but it is untenable, for it is plain from the context and spirit of the Rent Act that land-holder means proprietor in an absolute sense, for it is used throughout that Act in connection with the right to enhance rent and other absolute and independent powers which in no view of his legal position can a mortgagee be allowed to claim. Allusion is made by Pearson and Oldfield, JJ., to two cases, one decided by the Sudder Court in 1864 (1), and which is no doubt in favor of the appellant's contention, if the law it lays down could be accepted by this Court. But I am distinctly of opinion that the ruling in that case was erroneous and ought not to be followed. But it was further pointed out that that case had been followed by a decision of a Bench of this Court in *Sree Kishen v. Ishri Pertab* (2). It does not appear to me, however, that we are to conclude from the report of that case that it followed the ruling of the Sudder Court. It recites the ruling in question, but it expresses no opinion as to whether such ruling was right or wrong, and the judgment goes

(1) *Gokul Dass v. Balmokund*, S. D. A. Rep., N.-W. P., 1864, vol. ii, 592.

(2) H. C. B., N.-W. P., 1867, p. 299.

on simply to observe that the position of the parties to the suit had not been ascertained, and that it was a question whether, the plaintiff's share being in the possession of a mortgagee, he could bring a suit. This Court, therefore, remanded the case for re-trial and a fresh decision. Such a case, therefore, proves nothing. For all these reasons my answer to this reference, as already signified, is in the negative.

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PEARSON, J., and OLDFIELD, J., concurring.—The answer to the question referred depends on the construction to be put on the word co-sharer in cl. (g), s. 93 of Act XVIII of 1873, whether it includes a mortgagee of a co-sharer. We find that it has been held by the late Sudder Dewany Adawlut that s. 1, Act XIV. of 1863, which referred to suits by co-sharers for their share of the profits of an estate, was sufficiently comprehensive to include “not only actual proprietary co-partners, but all who occupy their places, such as transferees and mortgagees of their rights, who for the time occupy their places.” This was ruled in a case decided on the 25th November, 1864, No. 698 (1), in which it was held that a suit for a share of profits by a co-sharer of a mortgagee against another co-mortgagee recorded as responsible *mālguzār* must, under Act XIV of 1863, be brought in the Revenue Court; and the same rule was followed by this Court in *Sree Kishen v. Ishri Pertab* (2). Act XIV of 1863 has been superseded by Act XVIII of 1873, but the language of the two Acts, so far as they refer to suits by *lambardárs* for arrears of revenue payable through them by co-sharers whom they represent, and to suits by co-sharers for their share of profits, is the same; and we are indisposed to place any other construction on the term co-sharer in Act XVIII of 1873 than the one which has been hitherto accepted, and which would make it include a mortgagee, whatever opinion we might have been disposed to form had the question now come before us for the first time. It may be noticed that Act VIII of 1879 in amending the Land-Revenue Act has removed any difficulty of a similar nature that might arise under that Act in the definition of the term “owner,” by defining it to include a lessee, mortgagee,

(1). *Cokul Dass v. Balmokund*, S. D. A. Rep., N.-W. P. 1864, vol. ii, 592.

(2) H. C. R., N.-W. P., 1867, p. 299.

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or other person in possession of the land. The answer to the question referred will be in the affirmative.

STRAIGHT, J.—In answer to this reference I would say that, in my opinion, the defendant did not hold the relation of a co-sharer to the plaintiff, and therefore could not be sued by him in the Revenue Court for arrears of Government revenue under the provisions of cl. (g), s. 93 of the Rent Act, for he was a mere mortgagee without possession, and had not the full proprietary rights of a co-sharer. Such obligations as existed between them were embodied in the mortgage-deed, and it is in his character of mortgagor that the plaintiff is entitled to claim, and not as lambardár. It therefore seems to me that the suit was not cognizable by the Revenue Court.

On the case again coming before the Division Bench (PEARSON, J., and STRAIGHT, J.) for disposal, the following judgment was delivered by the Division Bench:

PEARSON, J.—The Judges of the Full Bench being equally divided in opinion on the question referred to it, we proceed to dispose of the appeal irrespectively thereof. Whether the suit be cognizable by a Revenue or by a Civil Court, the Judge was competent to dispose of it on the merits under s. 207, Act XVIII of 1873. On the facts found by the lower Courts, we think that the first ground of appeal should be disallowed, and we see nothing in the remaining grounds to warrant interference with their decision. The appeal is therefore dismissed with costs.

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August 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

ZULFIKAR HUSAIN AND ANOTHER (DEFENDANTS) v. MUNNA LAL AND ANOTHER (PLAINTIFFS)*

Suit on accounts stated—Act IX of 1871 (Limitation Act), sch. ii, No. 62—Act XV of 1877 (Limitation Act), s. 2, sch. ii, No. 64—"Title."

The accounts in a suit on accounts stated were stated when Act IX of 1871 was in force and were not signed by the defendant or an authorized agent on his behalf. Had that Act been in force when the suit was instituted the suit would have been

* Second Appeal, No. 302 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 23rd January, 1880, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 18th September, 1878.

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within time under No. 62 of schedule ii of that Act. The suit was brought, however, after the passing of Act XV of 1877, and by reason of the accounts not being signed did not come within the scope of No. 64 of schedule ii of that Act. *Held* that the words in s. 2 of Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," did not save the plaintiff's right to sue on the accounts stated, a right to sue not being meant by or included in the term "title acquired," that term denoting a title to property and being used in contradistinction to a right to sue; that the last clause of that section was not applicable, because Act XV of 1877 did not prescribe a shorter period of limitation than that prescribed by Act IX of 1871, but attached a new condition to the suit, *viz.*, that the accounts must be signed by the defendant or his agent duly authorized in that behalf; and that the suit was in consequence barred by limitation.

THIS was a suit for Rs. 652-7-6, principal moneys, and Rs. 132-6-0, interest thereon, the suit being based on accounts stated between the parties. The principal sum claimed represented the price of goods sold and delivered to the defendants between the 1st November, 1867, and the 21st April, 1869. The accounts between the parties were stated in writing on the 6th June, 1876, in the presence of the agent of the defendants, when Rs. 682-7-6 were found to be due from the defendants to the plaintiffs. The agent of the defendants paid the plaintiffs Rs. 30 on account, which reduced the balance due to the plaintiffs to Rs. 652-7-6. The statement of accounts was not signed by the defendants or their agent. The suit was instituted on the 22nd February, 1878. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants it was contended on their behalf that the suit was not one on accounts stated within the meaning of No. 64, sch. ii of Act XV of 1877, as the accounts were not signed by the defendants or their agent, and the suit was therefore barred by limitation under that Act. The lower appellate Court held that, as the accounts were stated before Act IX of 1871 was repealed and Act XV of 1877 came into force, under s. 2 of the latter Act the law of limitation applicable was that contained in Act IX of 1871 and not that in Act XV of 1877, and that the suit, being one on accounts stated within the meaning of No. 62, sch. ii of Act IX of 1871, was within time. The defendants appealed to the High Court, contending that Act XV of 1877 applied, and that the suit, not being one on accounts stated within the meaning of that Act, was barred by limitation.

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The Division Bench before which the appeal came for hearing (PEARSON, J., and STRAIGHT, J.), on the 5th July, 1880, referred to the Full Bench the question whether the suit was barred by limitation, the order of reference being as follows :—

ORDER OF REFERENCE.—The account in this case was stated on the 6th June, 1876, and was not signed by the defendant or a duly authorized agent on his behalf. At that time Act IX of 1871 was in force, and had it been in force when the present suit was instituted, the suit would be within time, under art. 62, sch. ii of that Act. But it has been brought after the passing of Act XV of 1877, and by reason of the account not being signed does not appear to come within the scope of art. 64, sch. ii of the enactment, unless any of the provisions of s. 2 thereof be held to be applicable.

We refer to the Full Bench the question whether the suit is barred by limitation.

The Senior Government Pleader (Lala Juala Prasad) and Shah Asad Ali, for the appellants.

Mr. Conlan, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—I unhesitatingly answer this reference in the affirmative. Since the passing of Act XV of 1877, indeed, the point has been repeatedly considered by me in other cases, and I have never had the least doubt on the subject. The question was carefully considered by Spankie, J., and myself in *Thakurya v. Sheo Singh Rai* (1), in which, while remanding the case on a minor point, we expressed a clear opinion to the same effect as that I now record. The same question appears to have been determined in the same way by the High Court of Madras in the case of *Khanji Premchand Sett v. Chandusivaji Sett* (2). The suit therefore mentioned in the present referring order is clearly barred.

PEARSON, J.—The first question raised by this reference is whether the words in s. 2, Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," save the plaintiff's right of action in the present

(1) I. L. R., 2 All., 372.

(2) 4 Ind. Jur., 68.

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suit. I cannot hold that a right to sue is meant by or included in the term "title acquired." That term appears to denote a title to property and to be used in contradistinction to a right to sue.

The last clause of the section is, in my opinion, inapplicable, because the period of limitation prescribed for this suit by Act XV of 1877 is not shorter than that prescribed by Act IX of 1871. The difference is that under Act IX of 1871 a suit could be brought on accounts stated only: under the new enactment the account must not only be stated but signed by the defendant or his agent duly authorized in that behalf. In other words, a new condition has been attached to the suit.

I am constrained therefore to conclude that, as the law stands, the present suit is in effect barred.

OLDFIELD, J.—I am of opinion that the suit is barred under art 64, sch. ii. of Act XV of 1877, and that the limitation is not saved by that part of s. 2 of the Act which provides that nothing in the Act shall be deemed to affect any title acquired under the Act of 1871 or any enactment repealed, the title acquired referred to being title to property, not mere rights of action. Nor do I consider that the latter part of s. 2 will apply to save limitation.

STRAIGHT, J.—The plaintiff bases his claim upon an account stated on the 6th June, 1876, and according to the law of limitation then in force, he was entitled to sue his debtor any time within the period of three years from that date. He did not, however, bring his present suit until the 22nd February, 1878, when, but for the passing of Act XV of 1877, he obviously had one year and eleven months remaining to him within which he might under the old law have taken proceedings. Unfortunately for the plaintiff, Act XV of 1877 requires that an account stated, in order to be available for the purpose of saving limitation, should be signed by the debtor or his legally authorized agent, and its practical effect is to render the plaintiff's unsigned account of no effect. This no doubt is a case of genuine hardship, from which it would be equitable to relieve him, but Act XV seems to me to afford us no means for doing so. I agree with Mr. Justice Pearson that plaintiff's right to sue on his unsigned account stated cannot be regarded as a

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"title acquired" within the meaning of s. 2 of the Act of 1877. Nor can I hold that the terms of art. 64 prescribe a "shorter period" of limitation than that prescribed by Act IX of 1871, when they in fact render an unsigned account stated inoperative altogether for the purpose of saving limitation. It, therefore, seems to me that the suit is barred.

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August 12.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

JUMNA SINGH AND ANOTHER (DEPENDANTS) v. KAMAR-UN-NISA
(PLAINTIFF)*

Act X of 1877 (Civil Procedure Code), Chapters XLI, XLII, and s. 577—Appeal—Res judicata.

M sued *K* and *J* to enforce a right of pre-emption in respect of property which he alleged *K* had sold to *J*. *K* denied that she had sold such property to *J*. *J* set up as a defence that *M* had waived his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. *J* appealed, making *M* and *K* respondents. The lower appellate Court dismissed the appeal, also holding that the alleged sale had not taken place. *J* then appealed to the High Court, making *K* the respondent. *Held* that neither the appeal from the original decree in the suit nor the appeal from the appellate decree therein was admissible.

Held also that the finding as to the alleged sale was one between the plaintiff and the defendants in the suit and not between the defendant-vendor and the defendant-vendee, who were not litigating, and would not bar adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the sale.

THE plaintiff in this suit alleged that the defendant Kamar-un-nisa had transferred to the two other defendants, by way of conditional sale or mortgage, her shares of two villages called Alinagar and Bahlui Deh, under an instrument dated the 22nd March, 1878; that he was a co-sharer of those villages, and as such entitled, under the terms of the administration-papers of those villages, to have such transfer made to him; and that, on receiving information of the conditional sale, he had expressed his desire to purchase the shares, but the vendor's husband and the vendees had refused to sell the same to him. He claimed to have an absolute sale of the shares made to him on payment of the principal amount of the

* Second Appeal, No. 68 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 9th October, 1879, affirming a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 21st June, 1879.

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mortgage-money. The defendant Kamar-un-nisa alleged that she had not executed the conditional deed of sale of the 22nd March, 1878, but that it had been executed by her husband without her authority. The other defendants (vendees) alleged that the conditional sale had taken place openly and publicly, with the knowledge of the plaintiff's agents, but neither the plaintiff nor any one on his behalf had offered to purchase the shares; and they claimed to receive the mortgage-money, with interest at the rate stipulated in the deed of conditional sale up to the end of the term (unexpired) mentioned in that document, in case the plaintiff's claim was established. The Court of first instance dismissed the suit on the ground that the evidence produced did not prove that the defendant Kamar-un-nisa had executed the deed of conditional sale. The other defendants (vendees) thereupon appealed, making the defendant Kamar-un-nisa and the plaintiff respondents. The lower appellate Court affirmed the decision of the Court of first instance and dismissed the appeal.

Those defendants then appealed to the High Court, making the defendant Kamar-un-nisa the respondent. They contended in their grounds of appeal that the conditional deed of sale had been executed in their favor by the defendant Kamar-un-nisa's husband under her authority. The Division Bench before which the appeal came for hearing (PEARSON, J., and STRAIGHT, J.,) referred to the Full Bench the question whether the appeal could be heard, the order of reference being as follows :

PEARSON, J.—The lower Courts have dismissed the plaintiff's suit, and he is not a party to the appeal, which is preferred by one of the defendants in the suit, and to which the other defendant has alone been made a respondent, the matter in issue being the authenticity and validity of a deed of conditional sale purporting to have been executed by the latter in favor of the former. We refer to the Full Bench the question whether the appeal can be heard.

Messrs. Conlan and Colvin, and Pandit Ajudhia Nath, for the appellants.

Mr. C. Dillon, and Munshis Hanuman Prasad and Kashi Prasad, for the respondent.

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The following judgments were delivered by the Full Bench :

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STUART, C. J.—The general question whether successful defendants in a suit can appeal from the decree in their favor has been raised in several cases in this Court, although under different circumstances. Three of these cases were cited in the argument before us in the present case, one of which, that of *Anant Das v. Ashburner & Co.* (1), has obviously no application, for that was simply a case where a judgment-debtor, in violation of his agreement, preferred an appeal to this Court, and which we therefore very properly disallowed. The two other cases are more germane to the question raised in the present appeal. The first was a ruling by the Full Bench in *Pan Kooer v. Bhugwunt Kooer* (2). There the plaintiff sued to set aside a *zar-i-peshgi* lease in the nature of a mortgage, executed by his father, on the ground that the father was an extravagant and dissolute man, and that the debt contracted by him was not for necessary purposes, and could not affect the property, which was ancestral. The Subordinate Judge found that certain items of the consideration for the lease, amounting on the whole to a sum of Rs. 5,300-9-0, were borrowed for legal and necessary purposes, and he held that, until that sum was paid, the plaintiff could not recover possession, but as to the remaining items they had not been proved. Under these circumstances the Subordinate Judge dismissed the plaintiff's suit *in toto*. Against this order the defendant appealed to the Judge as to the amount of the consideration for the lease and obtained a decree, and from that decree by the Judge the appeal to this Court was taken. The Division Bench before whom the appeal in the first instance was brought referred it to the Full Bench, directing attention in their referring order to certain conflicting rulings by this Court and the High Court of Calcutta. The question that thus came to be considered by our Full Bench was whether the appeal by the defendant from the order of the Subordinate Judge to the Judge had been validly and competently taken, and the answer of the Judges of this Court was unanimously in the negative. In my own judgment in that case I held the decree by the Subordinate Judge was not one of which the defendant was entitled to complain by appeal to the Judge, remarking that such "appeal is by the defendants themselves against a decree wholly in their own

(1) I. L. R., 1 All., 267.

(2) H. C. R., N.-W. P., 1874, p. 19.

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favour, and the legal meaning of which is and can only be that the plaintiff's suit altogether fails ;" and I further remarked that the Subordinate Judge's decree, "as read by the light of the plaint, is not only entirely in their favour, but positively beneficial to them, and that their appeal to the Judge was therefore incompetent and anomalous." That was a case, however, in which the defendants had no contention *inter se*, but on the contrary a common interest against the plaintiff, who was the respondent in the appeal.

The other case referred to in the hearing was *Lachman Singh v. Mohan* (1). There the Munsif had made a decree which on the face of it showed nothing against the defendants, and the question was whether under these circumstances the defendants could appeal to the Judge, seeing that as the Munsif's decree which, so far as it decreed anything, did so in favour of the defendants, *viz.*, by dismissing the suit against them, and therefore the Munsif's decree could not be said to be one by which the defendants were aggrieved. The majority of the Court were of a different opinion and disallowed the contention. I held that such a view of the provisions of the Code as was maintained on behalf of the plaintiff was too narrow, and that we may look, not only into the judgment, but in the pleadings, to see what the decree really meant, and that we ought not to confound the Munsif's decretal order with the decree itself as actually and formally made, and I went on to remark :— "In the present case it is plain that the decretal order is not self-explanatory, and if we had nothing else to go upon it would be necessary, in order to its being intelligible, to read it with the judgment ; and as to a decree itself in its complete form, I hold the opinion very strongly that, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and the record." I also referred to s. 206 of the Code of Procedure, where it is declared that "the decree must agree with the judgment," and therefore arguing that any defect or ambiguity in the decree could not be seen without reference to the judgment. I then pointed out that the Munsif's decree in that case showed plainly that it was one of which the defendants had reason to complain as being materially unfavourable to them. They had pleaded against the plaintiff's title, but the Munsif's decree as actually prepared

(1) I. L. R., 2 All., 497.

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contained a full recognition of the plaintiff's title as against the defendants, and that in fact the real meaning of the decree was that the defendants' right, if any, was not as proprietors as they had alleged, but as being in the inferior and subordinate position of lessees, and any claim which the plaintiff had against these defendants, as such lessees, could only be entertained in another suit. I therefore held that this was "not only a finding *pro tanto* against the defendants, but it is one which may injuriously affect any future proceedings on their part for the vindication of the proprietary rights they claim, for in any suit they might hereafter bring they might, according to the rulings of this Court and the Privy Council, probably be met by the "plea of *res judicata*," although with what effect could not be anticipated. In that case too, however, it must be remarked that the appeal was by two defendants who had a common interest, and that they and the plaintiff were fully represented in the proceedings, the plaintiff being respondent in the appeal to the Judge.

In the present case the circumstances are different : the plaintiff's suit against the defendants has been dismissed, and he is not a party to the appeal before us. The appeal is by the defendants *inter se*, that is, the matter in issue being the authenticity and validity of a deed of conditional sale purporting to have been executed by one defendant as vendor in favour of the other defendant as vendee. The question, besides, appears to have been considered by both the lower Courts who found that the deed of sale had not been proved. An appeal therefore on such a question by one defendant against another is wholly inadmissible, and as to the provisions of the Code of Procedure, I entirely concur in the opinion of my colleagues. I also agree with them that the finding of the lower Courts, although not admitting of an appeal between the two defendants, would not bar a suit by one against another for the establishment of the validity of the sale-deed.

I therefore agree in answering the question referred to us in the negative.

PEARSON, J. (OLDFIELD, J., and STRAIGHT, J., concurring).—Chapter XLI of the Procedure Code treats of appeals from original decrees, and Chapter XLII of appeals from appellate decrees. It is provided that an appeal shall be from such decrees generally. It is

not expressly said by whom an appeal may be preferred ; but it may reasonably be assumed that any party to the suit in which a decree is passed may, if dissatisfied with it, appeal from it. S. 577 refers to the judgment in appeal from original decrees, and enacts that it may be for confirming, varying, or reversing "the decree against which the appeal is made," and applies under s. 587 to judgments in appeal from appellate decrees. Hence also it is inferrible that the parties who are allowed to appeal are those who may desire that a decree should be varied or reversed.

In the case before us the plaintiff's suit for pre-emption was dismissed by the lower Courts; and the defendants-appellants here are not desirous that the decree dismissing the suit should be varied or reversed. What they complain of is a finding in the judgments of the lower Courts as to the validity of a sale in respect of which the claim to pre-emption was advanced. The appellate Court could not in disposing of the appeal vary or reverse the decree dismissing the suit so as to make a decree declaratory of the validity of the sale in question. I conclude therefore that neither was the appeal preferred to the lower appellate Court nor is the appeal preferred to this Court admissible.

The finding which is the subject of the appeal is, I conceive, a finding between the plaintiff and the defendants in the suit, and not between the defendant-vendor and the defendants-vendees, who are not now litigating, and would not bar an adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the validity of the sale-deed.

I would accordingly answer the question referred to us in the negative.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

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August 12.

HIMMAT SINGH AND OTHERS (PLAINTIFFS) v. SEWA RAM (DEFENDANT).*
Act VIII of 1871 (Registration Act), s. 17, cl. (2)—Registration—Mortgage—Suit on unregistered bond charging immoveable property.

The obligor of a bond bearing date the 20th January, 1873, agreed to pay the obligee Rs. 80, together with interest on that amount at the rate of Rs 2 per cent.

* Second Appeal, No. 97 of 1880, from a decree of G. M. Gardner, Esq., Judge of Agra, dated the 25th June, 1879, reversing a decree of Syed Munir-ud-din, Munif of Jalesar, dated the 15th April, 1879.

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per month, between the 2nd April, 1874, and the 1st May, 1874, and hypothecated immoveable property as collateral security for such payment. On the 15th February, 1879, the obligee sued the obligor on the bond to recover Rs. 196-8-0, being the principal amount and interest, from the hypothecated property. Held by the majority of the Full Bench (STUART, C. J., dissenting), that, for the purpose of registration, the value of the right assigned by the bond to the obligee in the property should be estimated by the amount secured for certain by the hypothecation, and, that amount exceeding Rs. 100, the bond should have been registered.

Per STUART, C. J.—That, for that purpose, the value of that right should be estimated by the principal amount of the bond, and, that amount being under Rs. 100, the bond did not require to be registered. *Nanabin Lakshman v. Anant Babaji* (1) and *Narasayya Chetti v. Gurusvappa Chetti* (2) followed.

Per PEARSON, J., OLDFIELD, J., and STRAIGHT, J.—That a suit on a bond for money charged thereby on immoveable property must, where the bond is not admissible in evidence because it is unregistered, fail.

THE plaintiffs in this suit claimed Rs. 196-8-0 on a bond dated the 20th January, 1873, being Rs. 80, the principal amount of the bond, and Rs. 116-8-0, interest on that amount from the 20th January, 1873, to the 15th February, 1879, the date of suit, at the rate of two rupees per cent. per month. They prayed that the amount claimed might be recovered from the property hypothecated in the bond. The plaintiffs were the legal representatives of the original obligee of the bond. The bond, which was not registered, was in these terms :—"I, Sewa Ram (defendant), son of Balli Singh, do hereby declare that Rs. 80, half of which is Rs. 40, as per detail below, ("Received in cash, Rs. 50: Due on previous account, Rs. 30"), are due by me to Thakur Gajan Singh: I agree and record that I shall pay the said amount with interest at the rate of rupees two per cent. per mensem in the month of Baisakh Sambat 1930 (corresponding with the period between the 2nd April, 1874 and the 1st May, 1874): that I have pledged and hypothecated my one-fourth share in the *patti* of Madho Singh.....until the said amount has been paid: and that I shall not transfer the same to any one else: hence this bond." The Court of first instance gave the plaintiffs a decree. On appeal the defendant contended that the bond required to be registered under Act VIII of 1871, and not being registered was not admissible in evidence. The lower appellate Court held that the bond

(1) I. L. R., 2 Bom., 353.

(2) I. L. R., 1 Mad., 378.

required to be registered under s. 17 of that Act, as it operated to create an interest of the value of upwards of Rs. 100 in immoveable property, and being unregistered was not admissible in evidence ; and dismissed the suit.

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The plaintiff appealed to the High Court, contending that the bond did not require registration ; and that as the bond had been admitted in evidence by the Court of first instance without objection, and that Court had decided the suit on the merits, the lower appellate Court was not competent to reverse the decision of the Court of first instance on a ground which did not affect the decision of the suit on the merits. The Division Bench before which the appeal came for hearing (PEARSON, J., and OLDFIELD, J.,) referred the case to the Full Bench for decision.

Munshi Hanuman Prasad, for the appellants.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the respondent.

The following judgments were delivered by the Full Bench:

STUART, C. J.—This case came originally before a Division Bench, consisting of Pearson, J., and Oldfield, J., and they have referred it to the Full Court. The material question to be determined in the case is whether the bond sued on was one in regard to which registration was compulsory or optional. The bond which is dated 20th January, 1873, is in these terms:—(After setting out the bond, the judgment continued): The bond thus secured two principal sums amounting to Rs. 80, with interest at the rate of two rupees per cent. per mensem, all of which the defendant agreed to repay in Baisakh Sambat 1930, or more correctly 1928. But the question we have now to decide is, not what was the whole sum which might be recovered in the month of Baisakh Sambat 1930 or 1928, or any other particular time, but what must be taken to be the value for the purpose of registration, and according to the true intent and meaning of the present Registration Act III of 1877, s. 17, by which it is provided that the documents of the nature of this bond shall be registered, if the property to which they relate is of the value of Rs. 100 and upwards.

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This question appears to have received much consideration by the High Courts of Madras and Bombay ; but there has been at the same time what I might almost call a course of decision in this Court, but directly in conflict with rulings of the other two Courts I have named ; those Courts holding that nothing but the principal sum acknowledged and secured by the bond ought to be considered as the value within the meaning of the registration law, and that the interest stipulated ought not to be taken into account for that purpose. This Court has, however, in many cases ruled the contrary, holding that at least the interest to be paid within a certain time mentioned in the bond may, for the purpose of determining the question whether the instrument must be registered or not, be taken into account and added to the principal sum, contrary however, to the opinion, as I shall presently show, of Sir Walter Morgan, my predecessor in this Court, and lately the Chief Justice of Madras ; and I may add that I myself have always entertained serious doubts on the subject.

After much consideration and study of the present and former Registration Acts and of the rulings to which I have referred, I have come to the conclusion that the *ratio decidendi* hitherto adopted by this Court is wrong, and that the legal principle recognised and applied by the Judges of the High Courts of Madras and Bombay is right. In a recent case before Oldfield, J., and myself, *Basant Lal v. Tapeswari Rai* (1), I gave expression to the doubts I entertained of the soundness of the course of decision in this Court, remarking that I had a very strong impression that the reasoning of the Bombay Judges, and particularly of the Chief Justice, was to be preferred. Since giving my judgment in that case I have anxiously considered the law on this subject and the several decisions of the Madras and Bombay Courts and of this Court, and the doubts to which I gave expression in the case referred to have been fully confirmed in my mind ; and I am now clearly of opinion that the principle of decision hitherto recognised and applied by this Court has been mistaken, and that we would be well advised in following the Madras and Bombay rulings. There were two cases in particular referred to at the hearing of

(1) See *ante*, p. 1.

this reference, one by the Madras Court—*Narasayya Chetti v. Guruvappa Chetti* (1), and the other by the Bombay Court—*Nanabin Lakshman v. Anant Babaji* (2). I may notice the Bombay case first as it is the first in point of date. The judgment in that case was delivered by Westropp, C. J., and in the course of his remarks he expressed his dissent from a ruling of this Court (3), by which it was held that the sum secured by the bond there was Rs. 99 *plus* Rs. 6 interest, and it was observed in the judgment of this Court that “this was the least sum that could have been recovered under the instrument.” The report of that case does not state the terms of the bond, but I find that it stipulated for the repayment of the principal sum of Rs. 99 with interest at the rate of Rs. 2 per cent. per mensem, and the time of payment is indicated thus: “payment to be made in Sambat 1928.” This mention of the time of payment would appear to have been made the foundation for the remark by this Court that the Rs. 99 *plus* Rs. 6 for interest “was the least sum that could be recovered under the instrument.” It now appears to me that this observation was altogether mistaken. The Rs. 99 might have been repaid long before, and indeed before any interest had accrued, for the stipulation that the payment was to be made in Sambat 1928 meant nothing more than that that payment was then expected, and if not then made the bond-holder would be entitled to recover. In his remarks on that case Sir Michael Westropp, C. J., explains the principle on which his Court has acted in such cases, and his exposition appears to me so clear and forcible that I quote what he says at length: —“The registration value was there gauged (he is speaking of the ruling of this Court), not by what the mortgagor received from the mortgagee as consideration for granting the alleged mortgage, but by what the Court regarded as the minimum sum which the mortgagee could have recovered under it. In this Court, however, in considering whether a mortgage is of the value of Rs. 100 or upwards, the value of ‘the right, title, or interest’ created by the mortgage has always been estimated by the amount of the principle money thereby secured: that being assumed to be the sum received by the mortgagor as consideration

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(1) I. L. R., 1 Mad., 378
(2) I. L. R., 2 Bom., 353

(3) In *Darshan Singh v. Hanwanta*,
I. L. R., 1 All., 274.

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for making the grant by way of mortgage, or, so to speak, the purchase-money of the mortgage. When it is necessary to determine whether an instrument, other than a deed of gift, purports or operates to create, &c., any right, title, or interest, of the value of Rs. 100 or upwards, to or in immoveable property, the test of value which we adopt is the consideration stated in the instrument, whether it be one of sale or mortgage, to be given to the grantor, and not either the minimum or maximum, or other benefit which may result from the transaction to the grantee whether he be vendee or mortgagee. There are reported cases in which the High Court of Calcutta [*Rohinee Debia v. Shib Chunder Chatterjee* (1)] and this Court [*Vasudev Moreswar Gunpule v. Rama Babaji Dange* (2), *Satra Kamaji v. Vishram* (3)] have ruled that the purchase-money mentioned in a deed of sale must be regarded as showing the value of the interest conveyed, for the purpose of determining whether or not the registration is compulsory. The circumstance that there is nothing in the terms of the Registration Acts to impose upon the Courts the duty of instituting any inquiry, as to the actual value of an interest in immoveable property affected by an unregistered instrument, previously to the admission of that instrument in evidence, and the many and great inconveniences and difficulties which would attend upon such an inquiry, are clearly pointed out in the judgments of Ainslie and Loch, JJ., in the first mentioned of those cases. There is naught in those Acts to suggest that there should be one mode of ascertaining the value in the case of deeds of sale, and another for testing the value in the case of a deed of mortgage, or of rent charge, or of annuity, or creating or conveying any other minor interest in, or charge or incumbrance upon, immoveable property. We do not know any good reason for making such a distinction, and can perceive many for refraining from its introduction. If the necessity for registration of a mortgage is to be ascertained, not by the consideration given by the mortgagee for it, but by the actual value of the transaction to the mortgagee, the test would, at the time of making the contract and when the parties would most need to know whether the mortgage must be registered, be wholly impracticable if the

(1) 15 W. R., 553.

(2) 11 Bom. H. C. R., 149

(3) I. L. R., 2 Bom., 97.

interest, or profits in lieu of interest, receivable by the mortgagee is to form one of the elements of value. The rate of interest might, of course, and usually would be then fixed, but the amount of it could only be known when the mortgage was redeemed or foreclosed. The time of redemption or foreclosure would depend on the pleasure or convenience of the parties or of one of them. Why should the first three or six months' interest, merely because it is specially noticed in the mortgage, be taken into account more than any subsequent interest receivable by the mortgagee? If the mortgagee be not entitled to interest under the mortgage, and the stipulation be that, in lieu thereof, he is to enter into occupation of the land and to cultivate it, and retain the profits arising from the cultivation, how, at the date of the contract, could the actual value of the mortgage to the mortgagee be ascertained? These are amongst the grounds upon which rests the practice, which has uniformly prevailed here, of estimating the value of a mortgage, as well under Act XVI of 1864, Act XX of 1866, and Act VIII of 1871, by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. Had we put a different construction on s. 13 of Act XVI of 1864, s. 17 of Act XX of 1866 or s. 17 of Act VIII of 1871, we should, we think, have converted those enactments into so many traps for the unwary, which could not have been the intention of the Indian Legislature. The words 'or in future', which occur in the two last-mentioned enactments, have reference, as we think, to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property."

The case decided by the Madras Court—*Narasayya Chetti v. Gurusvoppa Chetti* (1)—is also a singularly clear authority in favour of the same interpretations of the Registration Law. There the bond was for Rs. 95, to be paid "within December, 1873, in default to pay an increased quantity of grain and interest on the cash at the rate of 2½ per cent. per month." One of the defendants contended

(1) I. L. R., 1 Mad., 378.

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that the debt thus calculated was more than Rs. 100, and the bond not being registered was not receivable in evidence. This objection was disallowed both by the Munsif and District Judge. In appeal to the High Court, Morgan, C. J., delivered the following judgment:—"It is not too much to say of laws like the Registration and Stamp laws that, unless some simple and definite rule explains in what cases documents must be registered and stamped, the greatest confusion and hardship may arise. In the case of the stamp laws both in England and here it is settled that it is the *sum itself* and not interest, accretions, and so forth, 'that must guide the sum actually due at the time of taking the security, and not any sum to become due in future for the use of the money.'—*Pruessing v. Ing* (1). This is the convenient rule, and the language of the Stamp Acts makes it clear. The Registration Act may by its terms cause more difficulty. The words '*present or future, vested or contingent*,' to my mind, point, not to *the value* or its ascertainment, but to the right or interest in the land which is to be created as a security. The security may be one that will arise in future. The person giving it may have in the land no present vested right. If the charge or interest created is of a value less than Rs. 100, registration is needless. No doubt in many cases, as in this case, the land cannot be freed and restored to the proprietor until various increments and the principal sums are paid; but for registration purposes a future contingent value is useless. The act of registering must be done at once, but it is impossible beforehand to say what charge may ultimately have to be borne. The value of the present interest should determine. We might perhaps distinguish the decisions, but if possible it is more convenient in such a matter to have a broad rule.

Kindersley, J., agreed with the Chief Justice, and for very excellent reasons. He said: "In the present case the value secured payable at the periods appointed does not amount to Rs. 100, but in default of payment a fine in grain and interest became payable at certain rates. The amount of such fine would depend on the amount of the crop, and it was impossible at the time of execution to say how much, if anything, would become due on this account or on account of interest. I therefore agree that those uncertain

(1) 4 B. and Ald., 204.

amounts ought not to be considered in calculating for the purposes of the Registration Act the amount secured by the instrument."

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The deliberate and candid consideration which I have given to these views, even if we had nothing else to go upon, has affected my mind so strongly that I feel unable either to resist them or the reasoning by which they were arrived at. But I have further to observe that the mere mention in the bond of time or date for repayment, and for interest in the meantime, is simply an arrangement for the convenience of both parties, and is not of the essence of the contract; the legal meaning being that payment may be made at any date within the time mentioned, and when that expired, then the bond-holder would have a right to sue. In favor of this view the Madras case, and especially the reasoning of Kindersley, J., specially applies. On this subject too it is not irrelevant to refer to s. 9 of the General Stamp Act XVIII of 1869, by which it is provided that interest payable under any instrument shall not have the effect of increasing the duty chargeable on such instrument. The same law is enacted by s. 23 of the present Stamp Act I of 1879, the principal sum being the sole test under these Stamp Acts; and why there should be a different estimate when the value is to be reckoned for the purpose of registration it is not easy to understand. And there is another consideration which s. 17 of the Registration Act has suggested to me, and it is this, that the value of the interest "to create, declare, assign, limit, or *extinguish*," must be one and the same under all those conditions; in other words, that the right created, declared, assigned, or limited, is intended to be the same extent and value as that *extinguished*, and in registering an instrument which extinguishes a right you cannot, from the very nature of the case, be supposed at the time of registration to enlarge the right, title, or interest, so *extinguished*, by such an addition to the principal sum as that of interest or other increment. And this must therefore be the measure of the limit for the purpose of registration, when the right is one created, declared, or assigned, for it is obvious that such a right in measure and extent must be the same as that *extinguished*, and not one more favored as to value. Thus the value on all grounds for the purpose of registration must, according to the true meaning of the Registration Act,

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be considered to be the principal sum and nothing else. Then there is the argument of *convenience* in favour of the Madras and Bombay rulings, and which finds so large a place in the Madras case to which I have referred, and the reasonableness of which I think cannot be disputed, Sir W. Morgan, C. J., resting his judgment almost solely upon it. On such a subject indeed as the value of the right or interest referred to in s. 17, parties holding such instruments should not be troubled with any doubts or difficulties respecting the terms of the instrument, or with calculations as to interest, and the principal sum relating to the right created, &c., or extinguished can be the only certain criterion. To say the least, the law latterly laid down by this Court must be allowed to be doubtful, and that being so, the argument on the score of convenience ought to prevail. Therefore, while regretting I can no longer maintain the rulings of this Court on the question raised by this reference, I am bound to give expression to the conscientious conviction I have formed, and to answer this reference by expressing my opinion that the bond which was the subject of the suit did not require registration and ought to have been received in evidence.

PEARSON, J. (OLDFIELD, J., concurring).—This is a suit for recovery of the amount due under a bond, dated 20th January, 1873, from the property therein hypothecated. By the terms of the bond the defendant agreed to pay the sum of Rs. 80, then owed by him, with interest at two per cent. per mensem, at the end of fifteen months. The first Court decreed the claim. The lower appellate Court reversed its decision on the ground that the bond, being unregistered, is inadmissible in evidence.

The questions raised by the appeal are (i) whether the registration of the bond was compulsory, and (ii) whether, after it had been admitted in evidence by the first Court, the lower appellate Court was competent, on the ground of its inadmissibility, to reverse the first Court's decree.

For the determination of the first question it is necessary to decide whether the bond purports or operates to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of one hundred rupees and upwards to or in immoveable property.

The bond, if it does not expressly purport, at least operates to assign the executant's right, title, and interest in the property hypothecated to the creditor until payment of Rs. 80 with interest at the rate of two per cent. per mensem. The amount due on the date on which payment was claimable was in excess of Rs. 100. The value of the right assigned may be fairly estimated at the amount secured for certain by the hypothecation. The registration of the bond was therefore obligatory. In this view of the matter, it is unnecessary to discuss particularly the terms "in present or in future" and "vested or contingent," further than to remark that the latter words plainly refer to the nature of the right created, declared, assigned, limited, or extinguished by the instrument, while the former refer to the time of its operation; and that in the present case the right assigned was a vested right, and that the assignment was made on the date of the bond in suit.

For the determination of the second question it is necessary to decide whether the ground on which the lower appellate Court reversed the first Court's decree did or did not affect the decision of the suit on the merits. The contention of the appellant implies that, even if the bond be rejected as inadmissible in evidence, the decree of the first Court could have been maintained. But that contention cannot succeed. The suit is brought on the basis of the bond, and in the absence of the bond must fail. We would dismiss the appeal with costs.

STRAIGHT, J.—In answer to this reference, I would say that the bond in question appears to me to be an instrument creating and declaring the right, title, and interest of a mortgagee in immoveable property of the value of Rs. 100 and upwards. Though the principal sum recited in it is only Rs. 80, its terms virtually amount to a promise certain to pay Rs. 105 on the 1st May, 1874, and until that date, or default in payment made thereon, the obligee could make no demand. So far therefore as he was concerned, the hypothecation was intended to secure Rs. 80 principal, and Rs. 25 interest; and he, at the time of the execution of the bond, acquired the right, title, and interest of a mortgagee in immoveable property of the value of Rs. 100 and upwards, that is, actually and for certain to the extent of Rs. 105, and prospectively for so much

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more as might become due and payable by the obligor after the 1st May, 1874, by subsequent default. For the purposes of the obligee the bond could only be evidence of a transaction affecting property to the extent of Rs. 105, because his right to enforce lien was suspended until that amount had become due from the obligor. Meanwhile the obligor must be taken to have charged his immoveable property with the sum of Rs. 105, and thus to have created in the obligee the right, title, and interest of a mortgagee of the value of Rs. 100 and upwards. In short, looking at the bond itself, as evidencing the intention of the parties, the conclusion appears to me irresistible, that the transaction between them, so far as it related to the creation of a charge on immoveable property, was of a character that required the document recording it to be registered. Upon the other question I would say that, as the suit was brought upon the bond, and the bond is inadmissible in evidence for want of registration, the plaintiff's claim entirely failed, and the lower appellate Court rightly so held.

Appeal dismissed.

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August 12.

CIVIL JURISDICTION.

Before Mr. Justice Oldfield and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF NASIR KHAN (DEMANDANT) v.
KARAMAT KHAN (PLAINTIFF).*

Suit for Fruit upon Trees—Suit for compensation for the wrongful taking of Fruit upon Trees—Immoveable Property—Moveable Property—Suit cognizable in Small Cause Court—Act XI of 1865 (Mufassil Small Cause Courts), s. 6—Act III of 1877 (Registration Act), s. 3.

When the damage or demand does not exceed in amount or value the sum of five hundred rupees, a suit for the fruit upon trees, or damages in lieu thereof, is a suit cognizable in a Mufassil Court of Small Cause, the fruit upon trees not being immoveable property, but being moveable property, within the meaning of s. 6 of Act XI of 1865.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. It appeared

* Application No. 50B. of 1880, under s. 622 of Act X of 1877, for revision of an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 30th March, 1880.

that one Karamat Khan purchased from one Shib Charan Lal the fruit upon thirty-nine mango trees. One Nasir Khan, claiming that the trees belonged to him, removed the men employed by Karamat Khan to watch such trees, and took possession thereof, and gathered the fruit upon twenty-one of such trees. Karamat Khan in consequence sued Nasir Khan and Shib Charan Lal, claiming to recover in virtue of his purchase from Shib Charan Lal Rs. 30 as compensation for the wrongful taking of the fruit of such twenty-one trees, and the possession of the fruit upon the remaining trees, the suit being instituted in the Court of the Munsif of Farukhabad. The allegations of the parties to the suit gave rise to the issues, amongst others, whether the suit was cognizable in the Munsif's Court or in the Court of Small Causes, and whether the trees belonged to Shib Charan Lal or Nasir Khan. The Munsif gave the plaintiff a decree, holding that the suit was cognizable by him and not in the Court of Small Causes, and that the trees belonged to the plaintiff's vendor. On appeal by the defendant Nasir Khan the District Judge affirmed the Munsif's decree, also holding that the suit was not cognizable in the Court of Small Causes, on the ground that the fruit of a tree, so long as it was attached thereto, was immoveable property, and that the title to the trees in this case was in dispute. The defendant Nasir Khan applied to the High Court for the revision of the orders of the lower Courts on the ground that the suit was cognizable in the Court of Small Causes, and the lower Courts had no jurisdiction in the matter of the suit.

Munshi Hanuman Prasad and *Shah Asad Ali*, for the applicant.

The other parties did not appear.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—The plaintiff sued to recover the fruit of certain mango trees which he had purchased from the defendant Shib Charan Lal, and of which he had been dispossessed by the defendant Nasir Khan. He also asked in the alternative for damages in lieu of the fruit. The suit was instituted in the Court of the Munsif, and both before him, and on appeal to the Judge, it was

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urged on behalf of the defendant Nasir Khan that the case was one for a Small Cause Court. This objection was, however, overruled, and the plaintiff's claim was decreed. The same point is now taken before us in revision, and we are of opinion that it must prevail. The suit was for personal, that is, moveable property, or damages in lieu thereof, and it therefore directly falls within the terms of s. 6 of Act XI of 1865. We do not agree with the view of the Judge that fruit growing upon trees is to be regarded as immoveable property; on the contrary, the interpretation clause of the Registration Act of 1877 supplies a definition of what is moveable and immoveable property, which we think may be accepted as a guide. The proceedings of the lower Courts were therefore without jurisdiction and must be set aside, and the plaint must be returned to the plaintiff for presentation to the proper Court. The defendant Nasir Khan is entitled to his costs in the abortive proceedings.

APPELLATE CIVIL.

1880
August 12.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

KUNDUN LAL (PLAINTIFF) v. BANSI DHAR (DEFENDANT).*

Suit for money received by the defendant for the plaintiff's use—Fraud—Act XV of 1877 (Limitation Act), s. 18, and sch. ii, Nos. 62, 120.

The plaintiff claimed, as an heir to *N*, deceased, a moiety of moneys which at the time of *N*'s death were deposited with a banker, and which the defendant, the other heir to *N*, had received from such banker. *Held* that the suit was one for money received by the defendant for the plaintiff's use, to which the limitation provided in No. 62, sch. ii of Act XV of 1877 applied, and not one to which the limitation provided in No. 120 applied.

THE plaintiff in this suit claimed, as one of the heirs to the estate of one Nain Sukh, deceased, to be confirmed in possession of a moiety of Nain Sukh's one-third share of a house, and to recover a moiety of a sum of Rs. 376-15-6 which had belonged to Nain Sukh, and which at the time of his death was deposited with one Bhagwat Das, a banker. The defendant was the plaintiff's

* Second Appeal, No. 1299 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Moradabad, dated the 13th September, 1879, modifying a decree of Munshi Banwari Lal, Munsif of Amroha, dated the 24th March, 1879.

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brother, and the parties were the joint heirs to Nain Sukh. The plaintiff stated the following particulars concerning his claim : "The said Nain Sukh owned one-third of the house mentioned in the plaint : he died in the end of Asadh 1931 (in the year 1874) while on a pilgrimage : his property devolved on the parties in equal moieties : the plaintiff is a patwari in the Bahraich district, and in his absence the defendant realized Rs. 376-15-6 from Bhagwat Das, trustee, and gave a receipt : the plaintiff is in possession of the share of the house he claims, but the defendant wishes to eject him : the cause of action arose in the beginning of August, 1878, on the day the plaintiff became aware that the defendant had realized the money and evaded payment to the plaintiff." The suit was instituted on the 6th November, 1878. The defendant set up as a defence to the suit that it was barred by limitation under No. 62, sch. ii of Act XV of 1877. He further claimed to set-off against the amount claimed by the plaintiff certain moneys which he had expended on the funeral ceremonies of Nain Sukh, and in obtaining a certificate for the collection of the debts due to that person. The Court of first instance fixed the following issue, amongst other issues, for trial, viz :—If the defendant realized Rs. 376-15-6 from Bhagwat Das on the 22nd July, 1875, whether the limitation provided by No. 62, sch. ii of Act XV of 1877, applies to the suit. The Court held that it was proved that the defendant had realized Rs. 376-15-6 from Bhagwat Das on the 22nd July, 1875 ; and that the limitation provided by No. 62, sch. ii of Act XV of 1877, did not apply to the suit, but the limitation provided by No. 120 of that schedule. Its decision on the point of limitation was as follows :—"The limitation provided by No. 62, sch. ii of Act XV of 1877, has no bearing on this case. The amount in dispute was in the hands of the trustee as a deposit. The defendant received that sum from the depository as sole heir of the deceased depository. The plaintiff seeks to recover his share of the money from the defendant under right of heirship. The limitation of three years does not apply to a suit of this character, and no limitation has been provided for a suit of this kind. Therefore the period of six years applies to this case." The Court gave the plaintiff a decree in respect of the immoveable property in suit, and for a portion of the money claimed, allowing in part the set-off

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claimed by the defendant. On appeal by the defendant the lower appellate Court held that the suit, in so far as the claim for money was concerned, was barred by limitation, the period of limitation applicable thereto being three years as provided by No. 62, sch. ii of Act XV of 1877 ; and reversed the decree of the Court of first instance in so far as it allowed that claim. The plaintiff appealed to the High Court, contending that the suit, so far as that claim was concerned, was governed by No. 120, sch. ii of Act XV of 1877.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellant.

Babus *Jogindro Nath Chaudhri* and *Ratan Chand*, for the respondent.

The following judgment was delivered by the High Court :

JUDGMENT.—The plaintiff sues to be maintained in possession of his share of a house, and to recover his share of a certain sum of money which belonged to the estate of Nain Sukh, deceased, which had been left in deposit with certain bankers. Plaintiff claims by right of succession to Nain Sukh, and avers that the defendant has realized from the bankers the whole sum deposited and refuses to pay the plaintiff his share. The lower appellate Court dismissed that portion of the claim which refers to the deposit, holding that it is barred by three years' limitation, and that is the only point in appeal. Plaintiff contends that the law applicable is art. 120, and that limitation should run from the date when plaintiff had knowledge of the defendant's appropriation of the money.

We are of opinion that the appeal fails, and that the law of limitation applicable is art. 62, the suit being for money payable by defendant to the plaintiff for money received by the defendant for plaintiff's use. The receipt by the defendant was in law a receipt to the use of the plaintiff, to whom the sum in deposit rightfully belonged. The time will run from the date when the money was received and the claim is in consequence barred, for there is nothing to show fraudulent concealment so as to extend the term under s. 18. Art. 120 is of exceptional application, and

before applying it we must be satisfied that no other provision of the Limitation Act can be applicable. The appeal is dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

BALLABH SHANKAR AND OTHERS (DECREE-HOLDERS) v. NARAIN SINGH
AND ANOTHER (JUDGMENT-DEBTORS)*

1880
August 12.

Execution of Decree—Res judicata.

On an application being made for the execution of a decree the judgment-debtor made three objections to its execution. The first of these objections the Court executing the decree, the Subordinate Judge, allowed, and refused to execute the decree. On appeal by the decree-holder, the District Judge disallowed all three such objections, holding that the decree should be executed; and remanded the case for that purpose. When the case came back to the Subordinate Judge, the judgment-debtor again raised the second and third of such objections, but the Subordinate Judge refused to entertain them on the ground that they had already been determined by such District Judge. On appeal by the judgment-debtor the successor of such District Judge ordered the Subordinate Judge to determine all three such objections. *Held* that such succeeding Judge could not re-open such questions, his predecessor having already finally determined them, and his predecessor's order, so far as such application for execution of the decree was concerned, was final.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Sukh Ram, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.,) delivered the following

JUDGMENT.—The facts are these: The appellants are holders of a decree against respondents, dated the 6th June, 1861. They applied for execution in 1861, and on the 23rd September, 1861, the decree-holders and judgment-debtors entered into an agreement that the judgment-debtors should pay Rs. 500 in cash, and the balance of the decree by annual instalments of Rs. 100, without

* First Appeal, No. 68 of 1880, from an order of R. G. Currie, Esq., Judge of Aligarh, dated the 20th April, 1880, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 28th February, 1880.

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interest, and, in event of default in payment of two instalments, the decree-holders might realize the balance of the decree money, with interest at one per cent., in a lump sum, from the property pledged by the sureties and the judgment-debtors. The instalments appear to have been punctually paid into court until a recent date, and now that default has been made the decree-holders have applied for execution for the balance due against the judgment-debtors by sale of their property. The judgment-debtors made three objections to execution :—(i). That the application was barred by limitation ; (ii) that the agreement had suppressed the decree which was no longer capable of execution ; (iii) that the decree-holders should proceed against the sureties under the agreement. The first Court (Subordinate Judge) held that the application was barred by limitation. The decree-holders preferred an appeal to the Judge, Mr. Watson, urging that the payment into court of the instalments had kept the decree alive. Mr. Watson allowed the appeal : his order is as follows :—“ I must admit this appeal ; the words of the precedent quoted exactly meet the case ; the objection taken cannot and ought not to prevail : the decree-holder is entitled to take proceedings upon the *kist-bandi* as if it were part of the original decree : I therefore annul the order of the lower Court and decree the appeal with costs.” The case went back to the Subordinate Judge for disposal, and in his order, dated 28th February, 1880, after stating that the case was remanded in appeal by the Judge, and the judgment-debtors had petitioned to have their second and third objections disposed of, he proceeds to disallow them, holding that Mr. Watson’s order had already disposed of them. The judgment-debtors then appealed from this order to the Judge (Mr. Currie), Mr. Watson’s successor in office, and he has paid no attention to Mr. Watson’s (his predecessor’s) order, considering it not to be binding as *res judicata*, and has directed the Subordinate Judge to dispose afresh of all the objections originally urged by the judgment-debtors.

The decree-holders in appeal to the Court contend that Mr. Watson’s order is final, having been made in the same case between the parties. We are of opinion that the appeal is valid. Mr. Watson’s order was made in the matter of the same application

for execution which was before Mr. Currie, and, not having been appealed to this Court, must be held to be final so far as that application for execution is concerned. Mr. Currie could not in hearing an appeal arising out of a subsequent order of the lower Court in the same proceedings re-open a question already decided by his predecessor in office in the course of those proceedings. The judgment-debtors' course was to have preferred an appeal to this Court or applied for a review of judgment; but Mr. Currie could not set aside the order of his predecessor in office in the way he has done. His order treating Mr. Watson's order as void cannot be maintained; and since Mr. Watson's order did, as the Subordinate Judge held, in effect dispose of all the judgment-debtors' objections, Mr. Currie's order should be set aside and that of the Subordinate Judge restored. We decree the appeal with costs.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

JAIKARAN RAI AND OTHERS (PLAINTIFFS) v. GANGA DHARI RAI AND OTHERS (DEFENDANTS).*

1880
August 13.

Pre-emption—Conditional Sale—Act XV of 1877 (Limitation Act), sch. ii, No. 10.

Where a share-holder, if he desires to transfer his share, is bound to offer the transfer of it to his co-sharers before transferring it to a stranger, the right of pre-emption, in the case of a conditional sale, under which possession is not transferred, arises, not when such sale is made, but when the conditional sale becomes absolute.

Under No. 10, sch. II of Act XV of 1877, the period of limitation runs from the date physical possession is taken of the whole of the property sold.

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of twenty-two bighas ten biswas of land, the suit being based upon the administration-paper of the village in which such land was situated. The clause in that instrument, which bore date the 9th August, 1854, relating to the right of pre-emption of co-sharers in the village, was as follows: "Clause 10.—We, when under necessity and the Government revenue falls into arrear,

* Second Appeal, No. 1331 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 27th August, 1879, affirming a decree of Maulvi Kead Bakhsh, Munsif of Muhammadabad, dated 17th March, 1879.

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have, with the concurrence of all, the power to transfer the entire mahál: should any one be pressed by necessity, he is also at liberty to transfer his individual share, subject to this condition,—that he should first make the alienation to a sharer in the village: in case a sharer does not take it or pay a proper price, he may transfer to another than a sharer.” The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala Lalta Prasad, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the respondents.

The High Court (STUART, C. J., and OLDFIELD, J.,) delivered the following

JUDGMENT.—This is a suit to enforce a right of pre-emption based on the agreement entered in the administration-paper. A conditional sale was made by deed dated 3rd December, 1873; there was no transfer of possession, and on the expiry of the term the conditional vendee took proceedings to foreclose, and the year of grace expired on 23rd July, 1877. He then brought a regular suit to have the sale made absolute, and for possession, and obtained a decree on 19th December, 1878. The plaintiff has instituted this suit on the 15th January, 1879, to enforce his right of pre-emption in respect of the sale. Some of the property is still in the possession of a mortgagee whose mortgage is of prior date to the conditional sale. Both Courts have dismissed the suit on the ground of limitation. The plaintiff has appealed, and defendant-respondent has orally objected that no right of pre-emption accrued to the plaintiff on the conditional sale becoming absolute, any right he may have had having accrued at the time the contract of conditional sale was made. The contention is, however, untenable; the right in this case is based on the agreement in the administration-paper, and, under it, a co-sharer was bound to offer the transfer of his share to plaintiff, before transferring it to a stranger. In this case the property was only hypothecated under the deed with a condition of sale attached to the contract: no transfer, to which any right could attach under the terms of the administration-paper, can be

held to have been made until the sale became absolute. It was then that plaintiff's right of pre-emption arose.

On the question of limitation the appeal must prevail. The law is art. 10, sch. ii of the Limitation Act, and the period will run from the date when the purchaser takes physical possession of the whole of the property sold,—a period which has not yet expired.

We decree the appeal and reverse the decree of the lower Court and decree the claim with costs.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield,

BHAJAN LAL (PLAINTIFF) v. MOTI AND OTHERS (DEFENDANTS).*

Lambardár and Co-sharers—Mortgage of mahál by lambardár.

The lambardárs of a mahál, in order to pay revenue due by them and the other co-sharers of the mahál, transferred the mahál by conditional sale for a term of years, possession of the mahál being delivered to the conditional vendee. The mortgage-debt not having been paid within such term, the conditional vendee applied, as against the lambardárs, for foreclosure, and the mortgage having been foreclosed sued all the co-sharers including the lambardárs for possession of the mahál, alleging that the lambardárs had acted in the matter of the conditional sale, not only for themselves, but as agents of the other co-sharers. *Held* that, inasmuch as the other co-sharers had not either expressly or by implication authorised the lambardárs to enter into the particular contract represented by the conditional sale, and as they had not ratified such contract, they were not bound by the conditional sale and foreclosure.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case for the trial of the issues set out in the order.

Maulvi Mehdi Hasan and Shaikh Maula Bakhsh, for the appellant.

Munshi Sukh Ram, for the respondent.

The Court (STUART, C. J., and OLDFIELD, J.) made the following

ORDER OF REMAND.—The plaintiff sues to obtain possession of the entire mauza after foreclosure of a conditional sale made by a deed of 13th April, 1871. This deed was executed by the

* Second Appeal, No. 1292 of 1879, from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhānsi, dated the 2nd September, 1879, affirming a decree of J. J. McLean, Esq., Assistant Commissioner of Jhānsi, dated the 20th May, 1879.

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lambardárs of the mauza, and it is alleged they acted on the authority of the other co-sharers whom they represented as lambardárs, and the consideration of the conditional sale was a sum of Rs. 525 borrowed to pay off arrears of revenue due on the whole mauza by all the co-sharers. By the terms of the deed interest had to be paid at two per cent. per mensem on the sum of Rs. 525 borrowed, and the conditional vendee was put into possession of the mauza, and it was stipulated that the conditional vendors should be responsible for losses. Accounts were to be adjusted at the close of each year, and any surplus profits were to go to satisfy the interest and the principal debt; and in the event of there being a loss, and of the conditional vendor having to make it good, the amount of such loss was to be added to the principal debt; and in the event of the whole debt with interest not being satisfied within five years, the conditional sale should become absolute. On this deed the plaintiff, after taking proceedings to foreclose, has sued all the co-sharers for possession. The defence of the co-sharers other than the three lambardárs is that they had no knowledge of the deed in question, gave no authority to the lambardárs to enter into any contract of conditional sale, and are not bound by the deed, and that notices of foreclosure were not served on them according to law, and that no accounts were made up as required by the deed. The Court of first instance held that, although the deficiency of revenue and the means taken to supply that deficiency must have been matter of interest to all, and although the co-sharers to a certain extent supported the action of the lambardárs by allowing plaintiff to have the usufruct of the village and made no objection during eight years of his tenure, yet that it is not proved that they were aware of the terms of the mortgage, or accepted the stipulation of conditional sale, or were consulted by the lambardárs when they executed the deed, and it holds the deed in consequence not binding on them. It finds that accounts were properly audited, and inclines to hold that notice to be legally effective should have been served on all the co-sharers. The first Court decreed in favour of plaintiff for the actual shares in the mauza owned by the lambardárs. This decree has been affirmed by the lower appellate Court, but it appears to us that the decision is defective and unsatisfactory and the case should be remanded.

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The only point decided by the lower appellate Court is whether the co-sharers other than the lambardárs were parties to the mortgage-deed, and on this point all that the Judge says is:—"I decide it adversely to the plaintiff-appellant, because, although there may be reason to suspect after the mortgage-deed had been executed the other co-sharers may have become cognizant of the transaction, there is no trustworthy evidence to show that they were parties to it, the deed itself being altogether silent on the subject. Indeed, the careless and perfunctory nature of the proceedings on mutation of names, when the plaintiff-appellant's name was entered as mortgagee of the whole estate bears out the contention of the other co-sharers that the lambardárs acted on their own responsibility without reference to them." Now, it is not disputed that the co-sharers other than the lambardárs were not parties to the deed, in the sense that their names are not entered in the deed, but the point is whether they were parties to the transaction as being represented by the lambardárs who had their authority to make the contract in question. On this point the finding of the lower appellate Court is entirely obscure and indistinct. The first point to be determined is whether the lambardárs had the express authority of the co-sharers to make the particular contract represented in the deed, or a general and full authority to make any and every arrangement necessary for the purpose of obtaining money to pay arrears of revenue; if they had such authority their act will be binding on the co-sharers. But there is another question which the lower appellate Court has altogether ignored. It should be ascertained if the co-sharers became fully aware of the terms of the deed after its execution, particularly the terms as to the rate of interest and condition of foreclosure, accepted those terms and took benefit under them, for in that case they could not now repudiate the deed, although the deed may have been executed without their authority. In deciding these questions due consideration should be given to the admitted facts that the money was borrowed to pay a debt of revenue due by all the co-sharers, that the deed was witnessed by the patwári of the village and was registered, and that the mortgagee was put in possession under its terms of the whole estate and remained in possession for eight years. We remand the case for trial of the

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issues indicated, and also of a third issue whether any debt remained unsatisfied at the end of the year of grace and allow ten days for objections.

The lower appellate Court (Mr. G. Adams) found on the first issue, *viz.*, "Whether the lambardárs had the express authority of the co-sharers to make the particular contract represented in the deed, or a general or full authority to make any and every arrangement necessary for the purpose of obtaining money to pay arrears of revenue;" that "it was on the whole improbable that the lambardárs should have had such authority as was specified in the issue, and there was certainly not evidence to show that they had such authority." On the second issue, *viz.*, "Whether the co-sharers became fully aware of the terms of the deed after its execution, particularly the terms as to the rate of interest and condition for foreclosure, and accepted those terms and took benefit thereunder," the lower appellate Court found as follows:—"As to these points there is no evidence of value. The co-sharers certainly assented to the mortgage, but whether before or after execution of the deed is not shown. The rate of interest is common in this district, and they may very probably have been aware of it, though from what I know of the carelessness of the people of this district with regard to the incurring of debt, I think it quite possible that many of the co-sharers may never have concerned themselves as to the terms of the deed. In the absence of evidence I must find that the co-sharers did not become fully aware of the terms of the deed after its execution. In deciding the above issues I have fully considered the facts noted by the High Court, *viz.*, the reason for which the debt was incurred, the witnessing of the deed by the patwári, its registration, and the surrender of possession to the mortgagee. All these, however, are of much less weight than they would be regarding a village in one of the long-settled districts. Here joint responsibility, though it exists, has very seldom been enforced, and is but imperfectly understood by the people, while joint action by a large body of co-proprietors is very rare. The witnessing of the deed by the patwári and its registration do not, in my opinion, tend in any degree to show that the co-sharers accepted the terms of the conditional sale. The quiet surrender of possession to the mortgagee is very intelligible. The co-sharers could easily

be made to understand that in case of failure in payment of arrears of revenue they would be completely ejected from possession by Government, and would therefore be perfectly ready to admit possession by a mortgagee, which for the time being would leave them in very much the same position as before. Reckless as they are in all matters concerning debt, they may have for a time found little to object to in the possession of the village by the mortgagee. They held their fields as before and paid even less to him than they had before paid to Government. There is, however, nothing to show that they ever became fully aware of the terms of the conditional sale until the mortgagee proceeded to foreclose." On the third issue, *viz.*, "Whether any debt remained unsatisfied at the end of the year of grace," the lower appellate Court found that the debt was not satisfied at the end of that period.

On the return of these findings the High Court (STUART, C. J., and OLDFIELD, J.), accepting them and disallowing the objections taken thereto by the appellant, dismissed the appeal.

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APPELLATE CRIMINAL.

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Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* SITA RAM RAI.

*Abetment of Theft—Receiving stolen property—Joint undivided Hindu family—
Act XLV of 1860 (Penal Code), ss. 379, 411.*

A Hindu, intending to separate himself from his family, emigrated to Demerara as a coolie. After an absence of thirty years he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family he lived in commensality with it, but he did not treat such property as joint family property but as his own property. *Held*, that such property was his sole property, and his brother was not a joint owner of it, and could properly be convicted of theft in respect of it.

It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.

In 1879 one Tunsu returned from Demerara to his native village in the Ballia district, after an absence of thirty years, bringing with him property, consisting chiefly of Government currency

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notes, to the value of Rs. 6,000, which he had acquired in Demerara by his labour as a coolie. His father was dead when he returned, but his mother and his two younger brothers, named respectively Dalmir and Jhingur, were alive and living together in the family-house. Tunsu and his wife, who had also returned with him, resided in the family-house with his mother and his brothers, and their wives, the whole family living in commensality. The whole family lived peacefully together until Dalmir began to annoy Tunsu with demands for his share of the property which Tunsu had brought from Demerara, insisting that, as they were a joint Hindu family, he was entitled to his share of such property. Tunsu refused to accede to these demands, and on their being persisted in he declined to eat with his brother, and eventually determined to return to Demerara. Shortly before his intended departure, in January, 1880, Dalmir in the absence of his brother Tunsu entered the house and brought out from it the box containing the property, Debi Singh and Sita Ram, the zamindars of the village, standing at the door of the house while Dalmir was bringing out the box. When it was brought out the three persons departed together with it. Sita Ram subsequently restored to Tunsu currency notes aggregating in value Rs. 1,100, and a currency note belonging to Tunsu was afterwards found in his house. Upon these facts the Sessions Judge of Ghazipur, Mr. J. W. Power, convicted Dalmir, under s. 380 of the Penal Code of theft in a building, Debi Singh, under ss. 109 and 380 of that Code, of the abetment of that offence, and Sita Ram, under ss. 109 and 380 and s. 411 of that Code, of the abetment of that offence and of dishonestly receiving stolen property. The Sessions Judge observed in his decision with reference to Debi Singh and Sita Ram as follows :—"Debi Singh pleads not guilty to the charge. There is, I must admit, no evidence to show that he had concealed any of the stolen property, but there is abundant evidence on record to show that he stood by when the box was removed from complainant's house, and that he knew that Dalmir had stolen it, not having any right to it. He therefore abetted the offence of theft. Sita Ram also pleads not guilty to the charge, but he admits receiving the box from Dalmir, and the evidence on record shows that he was present with Debi Singh when the box was stolen ; that he made

over to Jhingur a sum of Rs. 1,100 in notes knowing them to have been stolen; that he told the police he would point out the stolen property; that a ten rupee note belonging to complainant was found in his house under very suspicious circumstances; and that several other notes were found concealed on the information of his servant Gobind. I consider, therefore, two offences have been proved against Sita Ram—first, abetment of theft, and second, concealment of stolen property.”

Sita Ram Rai appealed to the High Court.

Mr. Hill, for the appellant, contended that, Tunki and Dalmir being members of a joint Hindu family, the property acquired by Tunki was jointly owned by Dalmir, and the latter committed no offence by taking it, and the appellant, therefore, committed no offence by aiding in such taking or by receiving such property. The appellant, if guilty of an offence, is guilty of theft and not of abetment of theft. The appellant has been irregularly convicted and punished for abetment of stealing and receiving the same property. He referred to *Jacobs v. Seward* (1); Mayne's Commentaries on the Penal Code, 10th ed., 307; *Chalakonda Alusani v. Chalakonda Ratnachalam* (2); *Durvasula Gangadharudu v. Durvasula Narasammah* (3); Russell on Crimes, 4th ed., vol. i, p. 50.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—The appellant, Sita Ram Rai, was tried by the Sessions Judge of Ghazipur, in conjunction with two persons named Dalmir and Debi Singh, upon a charge of abetment of stealing certain valuable securities in cash in the dwelling-house of one Tunki, a brother of the accused Dalmir, and also for receiving the said property. Dalmir was convicted of the stealing, and Debi Singh and the appellant of abetting him; a further conviction being recorded against the latter under s. 411 of the Penal Code. The points taken by the learned counsel for the appellant are, first, that, Tunki and Dalmir being members of a joint undivided

(1) L. R., 4 C. P., 328. (2) 2 Mad. H. C. R., 56.

(3) 7 Mad. H. C. R., 47.

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Hindu family, Dalmir was a joint owner of the notes and cash taken by him, and therefore cannot be convicted of stealing ; secondly, that it is irregular to convict a person and punish him for abetment of stealing and for receiving the same property. The first of these objections appears to have no force. It is not necessary for me now to determine the point ; but I am by no means prepared to say that, under certain circumstances and facts, it might not be competent to charge one member of an undivided Hindu family with theft or criminal misappropriation of family property ; but the consideration of this question does not arise in the present case in which, whatever may be the presumption as to Tunsu and Dalmir being members of a joint Hindu family, the evidence entirely negatives any such presumption. It is clear to my mind that Tunsu altogether separated himself when he went to Demerara thirty years ago, and that he had no intention, when he returned to India early in 1879, to appropriate his savings as a common fund for the purposes of his family. His whole conduct shows that he treated the notes and money as his own, and in no way contemplated giving his relations a common interest with himself in them. I do not agree with Mr. Hill that the presumption of law is to the contrary. The Madras cases quoted by him no doubt go a long way in favour of his contention, but the soundness of their authority is by no means unquestioned, and I confess, with the greatest respect for the Court that decided them, I should hesitate before implicitly following them. In the present case it may further be remarked that Tunsu does not appear to have been provided with any exceptional advantages of education or maintenance from joint family funds, and his self-acquisitions by manual labour as a coolie cannot be credited to any special outlay made from them on his behalf. In my opinion, therefore, the notes and cash taken were the sole property of Tunsu, and Dalmir has rightly been convicted under s. 380 of the Penal Code. I also think that the appellant Sita Ram Rai and Debi Singh would have been more properly convicted of stealing than of abetment, for the evidence clearly shows them to have been principals to and participators in the dishonest removal of the property from the dwelling-house of Tunsu by Dalmir. I accordingly direct that the record be amended, and that the convictions of Sita Ram Rai and Debi Singh be entered

as under s. 380 of the Penal Code. The second objection urged by Mr. Hill has force, and I accordingly quash the conviction and sentence upon Sita Ram Rai under s. 411 of the Penal Code. The sentence passed by the Sessions Judge for the offence of abetment will stand against him as for the substantive offence under s. 380.

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APPELLATE CIVIL.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

AHSAN KHAN (JUDGMENT-DEBTOR) v. GANGA RAM (DECREE-HOLDER) AND
MUZZAFFAR ALI KHAN (AUCTION-PURCHASER) *

Application to set aside sale in execution of decree—Absence of judgment-debtor from British India—Limitation—Act XV of 1877 (Limitation Act), s. 13, sch. ii. No. 166—Act X of 1877 (Civil Procedure Code), s. 311.

The provisions of s. 13 of Act XV of 1877 are not applicable to proceedings in the execution of a decree.

THE judgment-debtor in this case was a soldier in Her Majesty's Indian Army, and at the time that certain immoveable property belonging to him was sold in the execution of the decree, that is to say, on the 20th November, 1879, was on foreign service with his regiment. On the 13th March, 1880, the judgment-debtor applied to the Court executing the decree, under s. 311 of Act X of 1877, to set aside the sale on the ground, amongst others, of irregularity in its publication by reason of which the property had been sold for an inadequate price. The Court rejected the application on the ground that, with reference to Act XV of 1877, sch. ii, No. 166, it was barred by limitation, holding that the provisions of s. 13 of that Act did not apply to proceedings in the execution of a decree. It also rejected the application on its merits.

The judgment-debtor appealed to the High Court.

Babu Beni Prasad, for the appellant.

Pandit Ajudhia Nath, for the respondent.

* First Appeal, No. 86 of 1880, from an order of Maulvi Amir-ul-lah Khan, Munsif of Sháhjahánpur, dated the 19th March, 1880.

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The Court (STUART, C. J. and STRAIGHT, J.) delivered the following

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JUDGMENT.—It does not appear to us that s. 13 of Act XV of 1877 applies to proceedings in execution, and we therefore do not think that time was saved to the appellant during his absence at Kabul. The other grounds are not pressed. The appeal is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Oldfield and Mr Justice Straight.

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UDAI RAM AND ANOTHER (DEFENDANTS) v. GHULAM HUSAIN (PLAINTIFF).*

Lambardár and Co-sharer—Profits.

The lambardár of one patti of a mahál, who was a shareholder of both pattis of the mahál, sued the lambardár of the other patti and a shareholder of such patti for profits divisible among the shareholders of the mahál generally, deducting the share of such profits belonging to the defendants. *Held* that, as the suit was one for settlement of accounts between the body of shareholders in which it was necessary that all of them should be properly represented, and as the plaintiff was suing without their authority, the suit was not maintainable.

A VILLAGE called Bedohri consisted of two pattis, one of $6\frac{1}{2}$ biswas, the other of $13\frac{1}{2}$ biswas. The plaintiff in this suit was the lambardár of the former patti, and Udai Ram, one of the defendants in this suit, was the lambardár of the latter patti. The plaintiff in this suit was a co-sharer of both pattis. Udai Ram and his co-defendant held lands in both pattis and a part of the common lands of the village as "*khud-kasht*" at certain rates of rent. They sub-let such lands from the beginning of 1283 fasli at enhanced rates of rent. The plaintiff brought the present suit against them in the Court of an Assistant Collector of the first class, claiming, as the profits of the co-sharers of the village, Rs. 1,102-10-4 the difference, after deducting the share of the defendants, between the rent payable by them for such lands for the years 1283 and 1284 fasli, and the rent payable to them by their sub-tenants for such lands for those years. He alleged that

* Second Appeal, No. 485 of 1880, from a decree of H. M. Chase, Esq., Judge of Saháranpur, dated the 11th March, 1880, reversing a decree of T. Harkness, Esq., Assistant Collector of the first class, dated the 1st December, 1879.

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the defendants held such lands at favorable rates of rent on the condition that they should retain them in their own cultivation, and that, if they sub-let such lands, they should forfeit their right to hold them at such rates, and should be liable to pay the rent payable by ordinary tenants in the village. The defendants set up as a defence to the suit, amongst other things, that the plaintiff was not competent, without authority, to sue on behalf of all the co-sharers of both pattis. The Court of first instance framed on the allegations of the parties the following issues, amongst others, viz.—“Can plaintiff as a lambardār or co-sharer sue the defendants in his own name to the exclusion of his co-sharers. Is plaintiff, being lambardār of the 6½ biswa patti, authorized to recover profits on behalf of the co-sharers of both pattis.” These issues the Court of first instance decided against the plaintiff, as also the other issues, and dismissed the suit. It observed in its decision as follows:—“With reference to the first issue, I have to remark that the plaintiff, in the absence of a power of attorney on behalf of the other co-sharers in his name, cannot sue the defendants but as their agent. Such suit under the rulings noted—*Ladlee Pershad v. Gunga Pershad* (1) and *Manohar Das v. Kishen Dyal* (2)—cannot be brought in the name of agents, but in that of persons in whom the legal right of suit is vested. Hence the action brought by the plaintiff against the defendant is illegal. Similarly, the plaintiff had sued the defendant for a similar claim for 1283 in Mr. Donovan’s Court, and the claim was lodged for patti 6½ biswas only. That officer passed a decree in his favor, but before him no such plea or question was moved; otherwise, had the above rulings been brought to his notice, I doubt not he would probably have concurred with my opinion on the point. The result of the above issue was sufficient to throw out the case. But the Court deems it necessary to touch on every issue, so that the case be thoroughly settled with regard to all the points at issue. Therefore I give my judgment relative to every remaining issue as follows. The above rulings shall answer for the second issue too. However, I do not think it amiss to remark that a lambardār generally can sue, for recovering of rent, the tenants of other co-sharers, if he has been

(1) H. C. R., N.-W. P., 1872, p. 59

(2) H. C. R., N.-W. P., 1871, p. 175.

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doing so according to village-custom. He can bring action for recovery of revenue against other co-sharers. But I do not see a rule under which he can sue on behalf of other co-partners a co-sharer having *khud-kasht* for the enhanced rent realized by the latter from his sub-tenants; much less, can he bring such an action for the patti (13½ biswa) of which he is not lambardār at all. This evidently leads one to conclude that the plaintiff is at least entitled to recover the claim for patti 6½ of which he is a lambardār. But under the rulings given above, and in the absence of a power of attorney on behalf of other co-sharers, the plaintiff is not authorized to lodge the action in hand at all." On appeal by the plaintiff the District Court gave him a decree for the amount claimed.

The defendants appealed to the High Court, again contending that the plaintiff was not competent to sue for the body of the co-sharers of the village without their authority.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD, J., and STRAIGHT, J.) delivered the following

JUDGMENT.—The plaintiff and defendants are co-sharers in the mauza which is divided into two pattis, plaintiff being lambardār in one patti, and one of the defendants lambardār in the other. The defendants hold and cultivate certain lands in both pattis: and this suit has been brought by the plaintiff to recover from defendants a sum of money which plaintiff alleges is divisible among the body of shareholders by way of profits, and for which defendants have to account out of the rents collected by defendants on the lands they hold, after deducting the defendants' own share of the profits. That is substantially the character of this suit, and it is therefore one in the nature of a suit for settlement of accounts between the body of shareholders, in which it was necessary that all should be properly represented. The plaintiff professes to sue for the body of shareholders, but he cannot do so without their authority, which is wanting in this suit. The primary

ground, therefore, on which the Court of first instance dismissed the suit is valid, namely, that the suit is not maintainable, and the third plea in the memorandum of appeal must prevail. We reverse the decree of the lower appellate Court and restore that of the first Court, and dismiss the suit with costs.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Straight.

NARAIN DAT (PLAINTIFF) v. BHAIRO BUKHSHPAL AND OTHERS
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Act X of 1877 (Civil Procedure Code), s. 13, Explanation II.—Res judicata.

S and B jointly sued N for the redemption of a mortgage of an eight-anna share of a village, B suing as the purchaser from the mortgagor of a moiety of such share. N did not in defence of such suit assert a right of pre-emption in respect of such moiety, although such right had accrued to him on its sale by the mortgagor to B. S and B obtained a decree in such suit and the mortgage was redeemed. N subsequently sued B and his vendor to enforce his right of pre-emption in respect of such moiety. Held that it was incumbent upon N in the former suit to have asserted in defence his right of pre-emption in respect of such moiety, inasmuch as if that right had been established it must, so far as B was concerned, have proved fatal to his title to redeem, and that as he had not done so the suit to enforce his right of pre-emption was barred by the provisions of s. 13 of Act X of 1877, *Explanation II.*

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu Jogindro Nath Chaudhri, for the appellant.

The Senior Government Pleader (Lala Juala Prasad) and Pandit Ajudhia Nath, for the respondents.

The judgment of the Court (PEARSON, J. and STRAIGHT, J.) was delivered by

STRAIGHT, J.—One Zor Prasad was the owner of an eight-anna share in mauza Hasanpur. This he mortgaged to the plaintiff-appellant, Narain Dat, in the year 1266 fasli for Rs. 701 advanced. Upon his death his estate was inherited by his son Pirbhu Dayal, whose name was recorded in the revenue record. Afterwards Pirbhu Dayal caused *dakhil-kharij* to be effected in favour of his cousin Sital Prasad in respect of four of the eight annas. The remaining four annas he sold to the defendants-respondents. Ultimately Sital

* Second Appeal, No 386 of 1880, from a decree of D. M. Gardner, Esq., Judge of Gorakhpur, dated the 27th January, 1880, reversing a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 11th September, 1879.

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Prasad and the defendants-respondents brought a joint suit against the plaintiff-appellant for redemption of the mortgage of 1266 fasli, and as no substantial defence was made they obtained a decree and the mortgage was redeemed. On the 11th of July the plaintiff-appellant instituted the present suit for possession of the four annas sold to the defendants, by establishment of his right of pre-emption. The first Court decreed the claim, but the Judge reversed that decision, holding that *Explanation II* of s. 13 of the Code of Civil Procedure barred the suit.

It is not without doubt that we feel ourselves constrained by prior decisions of this Court—I. L. R., 1 All., pages 76 and 316, and Second Appeal No. 364 of 1878, decided the 20th May, 1878, and by the terms of s. 13, to hold that the view of the lower appellate Court is correct. It is true that the former suit was for the redemption of a single mortgage on the entire eight annas, but the present defendants were parties to it, and came into Court asserting their right to participate in the redemption by virtue of purchase of the four annas made by them from Pirbhu Dayal. It would, therefore, seem that their status to figure in the proceeding at all should have been made the subject of attack by the now plaintiff, then defendant, setting up by plea his right of pre-emption, that no offer had been made him, and that he was always ready and willing to pay the consideration for which the four annas was sold. Moreover, to make such a defence the more effective, he might have applied to have Pirbhu Dayal joined as a party to the suit. Neither of these courses, however, did he adopt; and upon the authority of the cases quoted it would appear that, by not having done so, he has defeated his present claim. When the former suit was brought, the full cause of action now made the ground of his present suit by the plaintiff-appellant had accrued to him, and we think it was incumbent upon him in the former proceeding to assert his right, which, if established, to the extent of such a plea as we have already indicated, must, so far as the defendants-respondents, then plaintiffs, were concerned, have proved fatal to their title to redeem. Under these circumstances we are of opinion that the appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GAYA DIN (DEFENDANT) v. RAJ BANSI KUAR AND ANOTHER
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Hindu Law—Mitakshara—Mortgage of Joint ancestral Property by Father—Sale of property in execution of a decree against Father—Son's Right.

The ancestral estate of a joint Hindu family, consisting of a father and his minor son, was mortgaged by the father, as the head of the family and manager of the estate, as security for the repayment of moneys borrowed for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the estate, and obtained a decree against him directing its sale, and sought to bring the estate to sale in the execution of such decree. Held, in a suit by the minor son to protect his share in the estate from sale in the execution of such decree, that, the suit in which such decree was made, and such decree, being regarded as a suit against the father, and as a decree made against him as representing the family, such decree might be executed against the estate, notwithstanding the minor son had not formally been joined as a defendant in such suit. *Bissessar Lal Sahoo v Luchmessur Singh* (1) followed: *Deendyal Lal v Jugdeep Narain Singh* (2) distinguished (8).

THIS was a suit in which the plaintiff Raj Bansi Kuar claimed for herself a declaration of proprietary right to a two-anna share of a village called Dakhangaon, and for her minor son a similar declaration to a fourteen-anna share of that village, "by reason of such property being advertized for sale in satisfaction of an illegal demand." It appeared that Ramphal Lal, the husband of the female plaintiff, and father of the minor plaintiff, who at the time this suit was brought was alive, had on the 7th December, 1867, given Gaya Din and Mats Din, defendants in this suit, a bond for the payment of Rs. 2,800, with interest, on the 3rd June, 1871, hypothecating mauza Dakhangaon, described as belonging to him exclusively, as collateral security for the payment of such moneys. The obligees sued Ramphal Lal on this bond, and, on the 20th September, 1877, obtained a decree against him for the amount claimed thereunder, "by enforcement of the hypothecation and auction-sale of the hypothecated property." In the execution of this decree Dakhangaon was attached, and advertized for sale on the 20th December, 1878. The plaintiff Raj

* First Appeal, No. 46 of 1879, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 23th February, 1879.

(1) L. R., 1 Ind. Ap., 233; 5 Calc.

L. R., 477.

(2) L. L. R., 3 Calc., 198.

(3) See also *Deva Singh v. Ram Manohar*, L. L. R., 2 All., 746.

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Bansi Kuar objected to the sale, claiming the property as belonging to herself and the minor plaintiff under a partition made in 1866. The objection having been disallowed, the present suit was instituted by the plaintiffs against the obligees of the bond, the decree-holders, and Ramphal Lal, the judgment-debtor. The plaintiffs stated in their written statement as follows:—"According to the doctrines of the Hindu law, and the reliable authority of the Mitakshara, which is current in these Provinces, the father, the son, and the grandson have equal rights as heirs in the ancestral estate. No co-parcener in the ancestral family estate has a right to transfer, waste, or pledge an ancestral property so as to put it in jeopardy, without any necessity recognized by the Hindu law, or without the consent of the members of the family. In spite of all these considerations, the judgment-debtor, during the lifetime of his father (who was manager of the ancestral estate and responsible for the maintenance of the family, and for the discharge of the necessary obligations), hypothecated the entire mauza Dakhangaon, one of the ancestral properties, the subject of the suit, as security for an illegal debt personally contracted by him with the creditors without any legal necessity, without the consent, knowledge, and participation of the other members of the family, and without having any right or power to do so. Twelve years ago, before the debt due to the defendants, creditors, had come into existence, a partition of the ancestral property took place among the members of the family, during the lifetime of the grandfather of the minor, by reason of the misconduct and extravagance of the judgment-debtor; and a two-anna share of mauza Dakhangaon and a one-anna share of mauza Tikuria was assigned to the female plaintiff, and the remaining three annas of Tikuria aforesaid and fourteen annas of Dakhangaon to the minor, the rent-free land in Khas Mahál being awarded to the judgment-debtor for his own personal maintenance. According to that partition, the parties are up to this time in possession. The defendants, creditors, brought a suit on their bond for the aforesaid debt, which had not been contracted in good faith, against the judgment-debtor and the hypothecated property, and having obtained a decree wished to bring to sale, as the judgment-debtor's property, the entire ancestral estate. Thereupon, the plaintiff brought forward her objections, which eventually were allowed in respect of mauza Tikuria, by admitting the

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partition and possession, but disallowed summarily as regards Dakhangaon, notwithstanding the partition having taken place before the debt due to the creditors had come into existence. At the time of execution of the bond, the judgment-debtor was neither an absolute proprietor nor manager of the property, nor was he responsible for maintenance of the members of the family and household or for the discharge of the necessary obligations connected therewith. Under these circumstances, he was not authorized to pledge the estate of Dakhangaon as security for his own illegal personal debt. His act was unwarranted and contrary to the principles of the Hindu law. Neither the plaintiff nor other legal heirs are debtors under the decree, nor have they benefited by the debt. The debt was not contracted for any legitimate necessity with the consent of the members of the family, nor was the judgment-debtor, at the time they came into existence, a manager or superintendent of the ancestral property or responsible for the maintenance of the family and for the discharge of legal obligations connected with it. Under these circumstances, the property in suit, which is an undivided ancestral estate, partly in possession of the plaintiffs and partly in that of the judgment-debtor, as a life tenure, is not, according to Hindu or statutory law, liable to be sold in satisfaction of the demand of the creditors." The defendants Mata Diu and Gaya Din stated in answer to the *suitas* follows:—"No partition of shares took place between the plaintiffs and the judgment-debtor; and, according to the *shasters*, Raj Bansi Kuar, the wife of the judgment-debtor, has no right in the disputed estate, which is the ancestral property of the judgment-debtor. Therefore this false claim, which is brought on the allegation of partition and separate possession, should not at all be entertained. The plaintiff (Raj Bansi Kuar) personally has no right to bring the claim. The disputed property is the ancestral estate of Ramphal Lal, judgment-debtor, who has all along been in possession thereof; the plaintiffs are his wife and son who live jointly with him and are maintained by him. These facts will be fully established on investigation. The judgment-debtor aforesaid borrowed money on 7th December, 1867, from the defendant's firm, in a lawful manner, for the benefit of the family and meeting certain emergencies, executing a bond in the name of the plaintiffs; and it was after a good deal of litiga-

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tion, which was carried on up to the High Court, that a decree was obtained against the judgment-debtor. At the time the loan transaction took place and the bond was executed, the judgment-debtor's son had not been born; and therefore he has no right to question the judgment-debtor's acts. Before the taking of the property it is incumbent on a son to discharge the debts of his father; it is a pious duty. A claim in respect of the property cannot be regarded as valid without payment of such debts. The accusation of irregularity and drunkenness made against the judgment-debtor by his wife and son is totally wrong and groundless. The defendant does not think it necessary to make any further defence; he hopes that the Court will do justice in the matter. Such an undutiful wife and son cannot obtain any relief from the Court. The judgment-debtor having caused the mutation of names to be effected fraudulently in favor of his widow and son, after the hypothecation of the property in favor of the defendant, has caused this suit to be brought." The third and fourth issues framed by the Subordinate Judge for trial were as follows:—

"(iii) Whether twelve years ago, during the lifetime of Sital Prasad, the father of Ramphal Lal, defendant, a partition took place, according to which the plaintiff is in possession of a two-anna share, and Gur Saran Partap, her son, of a fourteen-anna share of mauza Dakhangaon, which is an ancestral zamindari estate; or whether no partition took place between the plaintiffs and Ramphal Lal and the latter is in possession? (iv) Whether Ramphal Lal, being a man of extravagant habits and bad character, mortgaged mauza Dakhangaon during the lifetime of his father, Sital Prasad, as security for the payment of debts contracted without any legal necessity, contrary to his powers and without the knowledge of the plaintiffs, who possessed a right under the Hindu law, and held possession; and therefore the property is not liable to be sold in satisfaction of the decree-holders' claims; or whether Ramphal Lal is not a man of loose and bad character, and he, having borrowed the money for the benefit of the family and meeting legitimate necessities, mortgaged the property at a time when Gur Saran Partap was not born, his wife having no right under the Hindu law? Has Ramphal Lal fraudulently caused the names of the plaintiffs to be recorded after hypothecation"? Upon these issues

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the Subordinate Judge decided as follows:—"The Court holds that the plaintiffs have not produced any partition-deed or any other document, of the time of partition, to support the evidence of witnesses produced by them to prove that they acquired the property in suit by partition more than twelve years ago, in the lifetime of Sital Prasad, the father of Ramphal Lal. The mere oral evidence of the witnesses does not satisfy the Court as to the partition having taken place at that period. From an extract of the patidari for 1279 fasli (1871-1872), filed with the records of the execution of the decree held by the decree-holders against Ramphal Lal, defendant, No. 419 of this Court, it is proved that, in respect of the entire mauza Dakhangaon, the names of Raj Bansi Kuar and Gur Saran Partap, her son, were entered in the papers, under an order dated 15th June, 1872, in this way, that two annas were recorded in the name of the Musammat and fourteen annas in the name of the minor. As to the fourth issue, the Court holds that the evidence of witnesses, copy of the application for execution made by Sital Prasad and Thakur Prasad, decree-holders, dated the 4th January, 1867, copy of the proceedings of the Sadr Amin's Court, dated the 12th March, 1869, filed by the plaintiffs, it is proved that the zamindari estate in question is the ancestral property of Ramphal Lal, defendant; that the plaintiffs have held possession of it as members of a joint family; that at the time of the execution of the mortgage-bond, on which the decree-holders have obtained the decree, Sital Prasad, the father of Ramphal Lal, was alive; and that the names of the plaintiffs were recorded in respect of the zamindari estate in question in 1279 fasli. The decree-holders not having impleaded the plaintiffs along with Ramphal Lal, debtor, and not having obtained a decree against them (plaintiffs), by proving that the debt was contracted for the necessary purposes specified in the Hindu law, for the benefit of the plaintiffs, and that the plaintiffs' property was liable for it, they have no right to bring to sale the property in dispute to satisfy the decree they have obtained against Ramphal Lal, defendant, alone. The nature of the debt due to the decree-holders is not very material in this case. The Privy Council ruling in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) and the Madras Court

(1) I. L. R., 3 Calc., 198.

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ruling in *Venkatasami Naik v. Kuppaiyan* (1) and *Venkataramayyan v. Venkatasubramania Dikshatar* (2) also support the view taken by the Court. In the cases cited, the son had instituted his suit (which was decreed) after the sale in execution of a decree which was against his father alone, while in the present instance, the suit is instituted by the son and wife before the auction-sale, but the principle applicable to both cases is one and the same. As the right of the son was held there not to have passed by the auction sale, because the suit, the decree, and the execution-proceedings therein referred to were not against the father; so in this case, the property in suit, being recorded in the names of the plaintiffs exclusively, cannot be sold, as in this instance too the suit was instituted, the decree passed, and the execution-proceedings taken against Ramphal Lal alone. The contention of the defendants that Gur Saran Partap was not born when Ramphal Lal mortgaged the property in suit in the bond; that according to Hindu law a wife has no right; that Ramphal Lal has fraudulently caused the names of the plaintiffs to be recorded after the mortgage, and the plaintiffs are not competent to take objections to the mortgage and the decree, is not sufficient. According to the principles of Hindu law (Macnaghten's Hindu law), "sons who are born, or begotten, or those who are yet to be born, have a right to the ancestral property." It was for this reason that the objections of the transferee as to the incompetency of the heir of the transferor of the ancestral property (who was born after the transfer) to question the transferor's acts, was held to be immaterial in *Ram Swaruth Pandey v. Baboo Basdeo Singh* (3). In the present suit, from the evidence of Rachpal Das, Mahabir, Sri Nath, and Janki Prasad, witnesses for the plaintiffs, who state that Gur Saran Partap is fifteen or sixteen years old, it is proved that he (Gur Saran Partap) was born before the execution of the bond, dated the 7th December, 1867, and from the maxim of the Hindu law, noted at p. 50, vol. I of the aforesaid work, and the concluding sentence of the Privy Council ruling noted above, it is proved that a wife has a right. As notwithstanding the entry of the plaintiffs' name in the revenue papers, in respect of the estate in dispute, in June,

(1) I L. R., 1 Mad., 354.

(2) I. L. R., 1 Mad., 358.

(3) H. C. R., N.-W. P., 1867, p. 168.

1872 (which entry was tantamount to a transfer), the decree-holders failed to implead them in their suit, impeaching the entry as fraudulent, they cannot sell the zamindari estate in dispute in satisfaction of the mortgage and the decree, according to the Calcutta High Court ruling in the case of *Nund Coomar Lall v. Razeeddeen Hossein* (1) and the Allahabad High Court ruling in the case of *Jhingur Sahu v. Dabi Charan Singh* (2)."

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The defendant Gaya Din, the defendant Mata Din having died, appealed, for himself, and as the legal representative of his brother Mata Din, to the High Court.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Hanuman Prasad, for the appellant.

Babus Baroda Prasad Ghose and Jogindro Nath Chaudhri, for the respondents.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.) was as follows:—

JUDGMENT.—One of the plaintiffs is the wife of one Ramphal Lal, now living, and the other is his minor son, on whose behalf his mother sues as guardian. It is averred that mauza Dakhangaon was one of the ancestral estates and was partitioned twelve years ago, and came into the possession of plaintiffs; and the other property in suit, eleven bighas in Khas Mahál, was assigned to Ramphal Lal for his maintenance. Ramphal Lal executed a bond in favor of defendant hypothecating the said mauza, and the latter obtained a decree against Ramphal Lal, and in its execution advertized the mauza and the land above mentioned for sale. Plaintiffs objected to the sale, but their objections were disallowed, and this suit has been brought. The relief sought has not been very distinctly stated in the plaint, but it is substantially to have the mauza declared to be the property of the plaintiffs, and the properties declared not liable to sale in satisfaction of the defendants' decree against Ramphal. The grounds on which the claim is based are that the mauza was, under the partition, the separate property of the plaintiffs, and the debt, being a personal debt of Ramphal and

(1) 10 B. L. R., 183.

(2) Unreported; S. A. No. 892 of 1876, decided the 8th December, 1876.

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not on behalf of the joint family or for any purposes which the law authorizes, is not a debt for which any of the property can be held liable, and the suit and the decree against Ramphal being personal against himself, to which plaintiffs were no parties, it is only his personal interest that can be liable. The defendant traversed these pleas, and the issues material to this appeal, which the Subordinate Judge laid down, had reference to the alleged partition and the character of the debt contracted by Ramphal, and the liability of the property to be sold in satisfaction of it under the decree obtained by the defendant against Ramphal Lal. The Subordinate Judge has decided that there has been no partition, and that the mauza Dakhangaon is the joint ancestral property of Ramphal Lal and the plaintiffs; and, without going into the question of the character of the debt or the circumstances under which it was contracted, he finds that, as the defendants, decree-holders, did not implead the plaintiffs along with Ramphal Lal in their suit against the latter, and did not obtain a decree against them, they cannot bring to sale under that decree the plaintiffs' property; and the Subordinate Judge cites the case of *Deendyal Lal v. Jugdeep Narain Singh* (1); and he has decreed the claim for a declaration of the plaintiffs' proprietary right in mauza Dakhangaon, and dismissed the claim in respect of the land. The defendants, decree-holders, have appealed to this Court. This appeal only has reference to the decree in respect of mauza Dakhangaon.

The first two pleas in appeal fail. There was clearly a cause of action for this suit, and the suit being substantially for a declaration of the plaintiffs' right, and that the property is not liable to sale in execution of defendants' decree, is certainly maintainable; and the plaintiffs' failure to establish their separate title under the alleged partition will not deprive them of any right they may have to a declaration in their favor that the property is not liable to be sold in satisfaction of defendants' decree, which, as already stated, is the substantial object of their suit and the real relief they ask on the other ground that the joint ancestral property is not liable to be sold in execution of a decree against Ramphal Lal. The other pleas in appeal are in effect directed against this last contention of

(1) I. L. R., 3 Calc., 198.

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plaintiffs and are that the plaintiff Raj Bansi Kuar has no right or title in the mauza, and that Ramphal Lal was competent to execute the bond and hypothecate the property; that the minor plaintiff was not born at the time the bond was executed; and that the decree against Ramphal Lal is good against the entire mauza, the cases cited by the Subordinate Judge being irrelevant. No objection has been taken to the finding of the lower Court that there has been no partition as alleged, and in its absence it is quite clear that Raj Bansi Kuar has no *locus standi*, personally having no interest in the property in suit. The only question which we are therefore concerned with in this appeal is the right of Gur Saran Partap, the minor son of Ramphal Lal, to have the mauza Dakhangaon declared not liable to sale in execution of the decree against his father Ramphal Lal. The evidence establishes that Gur Saran Partap was born before Ramphal Lal executed the bond in favor of the defendants, although he could not have been more than two or three years old at the time, and his father Ramphal Lal was the manager for the family; and it also is established by the evidence that the debt was a joint debt contracted for the benefit of the family and expended for its benefit. These facts sufficiently appear from the statements of the defendants' witnesses, and there is nothing reliable in the evidence of the plaintiffs' witnesses to the contrary or credible in their statements imputing profligacy to Ramphal Lal.

Looking at the bond, we find it hypothecated the entire mauza. We have therefore a bond executed in favor of defendants by the father of the minor as the head of the family for a family debt hypothecating the entire mauza the joint ancestral property, and the whole property including the son's interest is liable for a debt of the character of the one in this suit. But the Subordinate Judge has held the property not liable to sale in execution of the decree against Ramphal Lal with reference to the frame of the suit and the decree; we have therefore to examine those proceedings. The suit though brought only against Ramphal Lal was brought to recover a joint debt, and the relief sought was to enforce the hypothecation and to bring to sale the entire mauza, that is, the entire joint ancestral estate, and the decree ordered the recovery of the

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debt by enforcement of the hypothecation and sale of the entire mauza. It appears to us that the suit was brought against Ramphal Lal and the decree made against him as the representative of the family for recovery of a joint debt by sale of the joint ancestral property, and the decree may be executed against the whole of the joint ancestral property, notwithstanding that the minor plaintiff was not formally included among the defendants. At the time of the institution of the suit the minor plaintiff was the only other member of the family who had any interest in the property, and Ramphal Lal then as now was his natural guardian.

In a Hindu family "the father is in all cases naturally and in cases of infant sons necessarily the manager of the joint estate,"—*Suraj Bansi Koer v. Sheo Persad Singh* (1); and when a suit is brought against the father, the assumption that the father is sued as representing the minor son is thus consistent with the constitution of the Hindu family and the father's position. The principle laid down in *Bissessur Lal Sahoo v. Luchmessur Singh* (2) appears to apply to this case. There two decrees had been obtained against one member of a Hindu family in suits brought against him alone: the question was whether the entire family property was liable to be sold in execution of the decrees. Their Lordships held that, the family being joint, it must be assumed that the member is sued as a representative of the family, and "when looking to the substance of the case and the decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, they may be executed against the joint family property." The case of *Deendyal Lal v. Jugdeep Narain Singh* (3) is in some points different from the case before us. There a sale had taken place in execution of a decree against the father, and the decree-holder himself was the purchaser: it was held he could only be said to have bought what was seized and sold in execution which was the father's interest. We decree the appeal and dismiss the suit with all costs.

Appeal allowed.

(1) I. L. R., 5 Calc., 143.

(2) L. R., 6 Ind. Ap., 233; 5 Calc. L. R., 477.

(3) I. L. R., 3 Calc., 198.

CRIMINAL JURISDICTION.

1880
August 13.

*Before Mr. Justice Pearson.*EMPRESS OF INDIA *v.* BAKHSHI RAM AND OTHERS.

Landholder, duty of—Neglect to aid a public servant—Disobedience to order by public servant—Act X of 1872 (Criminal Procedure Code), ss. 90, 91—Act XLV of 1860 (Penal Code), ss. 187, 188.

A Magistrate directed a landholder "to find a clue" in a case of theft "within fifteen days, and to assist the police." *Held* that such order was not authorized by ss. 90 and 91 of Act X of 1872, and the conviction of such landholder, under ss. 187 and 188 of the Penal Code, for disobedience to such order, was not maintainable.

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of the order of the Magistrate of the Agra District, Mr. A. J. Lawrence, dated the 31st May, 1880, affirming on appeal the order of Munshi Raja Lal, Magistrate of the second class, dated the 26th April, 1880, convicting the petitioners of offences under ss. 187 and 188 of the Indian Penal Code.

It appeared that on the 21st January, 1880, the ornaments on the top of two of the domes of buildings in the Sikandra Bagh at Agra were stolen. The police reported to the Magistrate concerned that several similar thefts had previously taken place, but none of the zamindars of the villages in the neighbourhood of the Sikandra Bagh had taken any steps to discover the offenders, and they requested the Magistrate, Mr. J. P. Hewett, to issue an order to the zamindars to assist the police in obtaining a clue to the discovery of the thieves on the present occasion. The Magistrate accordingly, on the 24th January, 1880, issued an order to the petitioner Bakhshi Ram, lambardár and zamindar of mauza Sikandra, and to the petitioners Mithu Lal and Ganga Ram, lambardárs and zamindars of mauza Gailana, and to certain other persons, lambardárs and zamindars of other villages in the neighbourhood of Sikandra Bagh, directing them "to get a clue of the case within fifteen days and to give sufficient assistance to the police." On the complaint of the police, "that the petitioners had given them no assistance, but on the contrary abstained from so doing, and had neglected to perform their duty intentionally for the purpose of spoiling the case," the petitioners were charged before Munshi Raja Lal with omitting to

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assist public servants in the execution of their duty when bound by law to do so, and with disobedience to an order duly promulgated by a public servant, offences respectively punishable under ss. 187 and 189 of the Indian Penal Code, and were convicted of those offences and fined. On appeal by the petitioners the Magistrate of the District affirmed the convictions, observing in his decision that it was proved that the petitioners had not assisted the police, and ss. 90 and 91 of Act X of 1872 seemed to authorize the orders issued by Mr. J. P. Hewett which the petitioners had not obeyed.

The grounds on which revision was sought were that, as the order of Mr. J. P. Hewett of the 24th January was illegal, the petitioners were not bound to obey it, and were not punishable under ss. 187 and 188 of the Penal Code for disobeying it, and not rendering assistance to the police.

Mr. Colvin, for the petitioners.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

The portion of the judgment of the Court material to the purposes of this report was as follows:—

PEARSON, J.—The processes issued by Mr. Hewett on the 24th January last to Bakhshi Ram and others of Sikandra, and to Mithu Lal and others of Gailana, requiring them to find a clue in a case of theft within fifteen days were wholly unwarranted by law, and the Magistrate of the District is wrong in holding them to have been authorized by the provisions of ss. 90 and 91, Act X of 1872. The conviction of the petitioners under ss. 187 and 188 of the Indian Penal Code is altogether indefensible, and is accordingly set aside, and the sentences passed on them by the Native Magistrate are annulled, and any fines which may have been realized thereunder are ordered to be refunded.

The duties of landholders are defined in ss. 90 and 91, Act X of 1872, which do not require them to perform the duties for which the police are appointed and paid. S. 90 requires them to give to the police any information they may obtain of the matters specified in clauses a., b., c., and d. S. 91 requires them to assist

a Magistrate in certain specified cases. The orders issued by Mr. Hewett were not, as I have already observed, warranted by either section ; nor were the petitioners legally bound to attend upon the police for the purpose of carrying out that order.

Application allowed

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 August 18.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF MAULVI MUHAMMAD (JUDGMENT-DEBTOR) v. SYED HUSAIN (DECREE-HOLDER).*

Powers of Revision of the High Court under Act X of 1877 (Civil Procedure Code), s. 622.

Per PEARSON, J., OLDFIELD, J., and STRAIGHT, J.—When, under s. 622 of Act X. of 1877, the High Court has called for the record of a case in which no appeal lies to it, it may, under that section, pass any order in such case which it might pass if it dealt with the case as a second appeal under chapter XLII. of that Act.

Per STUART, C. J.—The High Court may, under that section, pass in such case any order, whether in regard to fact or law, as it thinks proper.

Where in a case of the execution of a decree in which no second appeal lay to the High Court, the appellate Court held, on the construction of the decree, that it awarded interest on the principal amount of the decree, the High Court, under s. 622 of Act X. of 1877, holding that the appellate Court has misconstrued the decree, and that the decree did not award such interest, modified the order of the appellate Court accordingly.

THE decree of which execution was sought in this case was one for Rs. 408, and directed, amongst other things, that the decree-holder should, in the first instance, recover that sum from the judgment-debtor Badri Nath, and that, if he could not do so, he should then recover it from the judgment-debtor Maulvi Muhammad. In the present application for the execution of the decree, the decree-holder sought to recover that sum, and the costs of the suit, and interest from Maulvi Muhammad. That judgment-debtor objected that the decree-holder had taken no proper steps to execute the decree

* Application No. 31B of 1880, for revision under s. 622 of Act X. of 1877 of an order of H. A. Harrison, Esq., Judge of Mirzapur, dated the 24th January, 1880.

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against Badri Nath, and that, until he had done so, the decree could not be executed against him. The Court executing the decree disallowed this objection. On appeal by the judgment-debtor the appellate Court held that, as the decree-holder had not seriously attempted to execute the decree against Badri Nath, he could not recover the principal amount of the decree from Maulvi Muhammad until he had done so and failed, but that he could recover the costs and interest claimed, holding that the decree allowed interest on the principal amount of the decree. Maulvi Muhammad thereupon preferred an application to the High Court for the exercise of its powers of revision under s. 622 of Act X. of 1877, contending that the appellate Court had acted illegally in the exercise of its jurisdiction in ordering him to pay the decree-holder interest on the principal amount of the decree, contrary to the terms of the decree. The Division Bench before which the application came for hearing (OLDFIELD, J., and STRAIGHT, J.) referred to the Full Bench the question whether, under the provisions of that section, the Court might pass any order on the application which it might pass if it dealt with the case as a second appeal, the order of reference being as follows :—

OLDFIELD, J.—We refer for the decision of the Full Bench the question which arises in this case, whether the Court, having called for the record of a case under s. 622 of the Civil Procedure Code, in which no appeal lies to the High Court, may, under the provisions of that section, pass any order thereon which it might pass if it dealt with the case as a second appeal, under chapter XLII. of the Code of Civil Procedure.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the petitioner.

Munshi *Kashi Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—My answer to this reference is that under s. 622 this Court has the power to pass all orders it could pass in second appeals, to say the least, for I incline to the opinion that s. 622 gives us still larger powers of revision in civil cases than

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we have in second appeals, where we are limited to questions of law. Under this s. 622, I consider, we can make any order, whether in regard to fact or law, we may think proper for the purposes of the justice of the case. In fact, it appears to me that the power given to the High Court under s. 622 in civil cases very much resembles, if it is not the same as, the jurisdiction given to the High Court in criminal cases under s. 297 of the Criminal Procedure Code, by which the High Court is empowered to "pass such judgment, sentence, or order as it thinks fit." In my opinion, we have under s. 622 the same power as this in civil cases.

PEARSON, J.—I would answer the question in the affirmative, because the terms of s. 622 seem to include all the grounds on which by the provisions of s. 584 of the Code a second appeal may lie, and to confer powers as extensive as those exercised by the High Court in disposing of second appeals.

STRAIGHT, J. (OLDFIELD, J., concurring).—I would answer this reference by saying that, in my opinion, the terms of s. 622, Act X. of 1877, as amended by Act XII. of 1879, are so wide and comprehensive as to invest the High Court with the power to call for the records of cases not open to second appeal, and to pass any order on them which might properly be made in second appeal. The words added by Act XII. of 1879 were apparently introduced for the purpose of relaxing the somewhat contracted limits within which it had been competent for the High Court to exercise revision over the proceedings of subordinate tribunals in which no second appeal lay, and to give them a narrow interpretation would, I think, be to defeat the object the Legislature had in view. Placing the most reasonable construction I can upon the terms "acting in the exercise of its jurisdiction illegally or with material irregularity," I should read them to mean, deciding erroneously in point of law, or irregularly in a material particular in respect of procedure, and if this view be correct, the High Courts must necessarily possess in revision all the powers they have in second appeal. It is argued that this practically provides a second appeal in all cases that are in the strict sense of the term unappealable, and it is further urged that, if so serious an alteration of the law had been contemplated, words might readily have been found to express such

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an intention. I confess I feel the force of this contention, but I cannot give effect to it in face of the, what appear to me to be, plain directions of s. 622 in its present shape. I would accordingly answer the question put by this reference in the affirmative.

The Division Bench (OLDFIELD, J., and STRAIGHT, J.), on the case again coming before it for disposal, made the following order:—

OLDFIELD, J.—We are of opinion that the Judge has wrongly construed the decree and that it does not allow interest on the principal debt but only on the costs. So far the order of the Judge is modified. The applicant will have his costs of this application.

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August 23.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

DIWAN SINGH AND ANOTHER (PLAINTIFFS) v BHARAT SINGH AND OTHERS (DEFENDANTS).*

Sale in Execution of decree—Suit to set aside order setting aside Sale—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257.

The Court executing a decree having made an order setting aside a sale under Act VIII of 1859 of immoveable property in the execution of the decree, the purchaser at such sale sued the decree-holder and the judgment-debtor to have such order set aside and to have such sale confirmed in his favour. *Held* (OLDFIELD, J., dissenting) that the suit was maintainable, the provisions of s. 257 precluding an appeal from an order setting aside a sale, and not a suit to contest the validity of such an order, and that, the order setting aside the sale in this case being *ultra vires*, the auction-purchaser was entitled to the relief he claimed.

THE plaintiffs in this suit claimed to have the order setting aside a sale of immoveable property in the execution of a decree set aside and to have such sale maintained. The property had been proclaimed for sale on the 20th September, 1877, under an order of the Subordinate Judge of Meerut. On the 14th September, 1877, the judgment-debtors applied to the Subordinate Judge to postpone the sale. On that date the Subordinate Judge made an order on the application directing the postponement of the sale, on condition that the judgment-debtors deposited the fees for issuing fresh notifications of sale, and directing the issue of fresh notifica-

* Appeal under cl. 10, Letters Patent, No. 1 of 1880.

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tions of sale fixing the 20th November, 1877, for the sale. On the 19th September, 1877, such application of the judgment-debtors was again laid before the Subordinate Judge, and it was brought to his notice that the deposit required to be made by the judgment-debtors by his previous order on the application had not been made. Upon this, and the judgment-debtors not appearing when called, the Subordinate Judge, on the same day, made an order rejecting the application. The sale accordingly took place on the day originally fixed, the 20th September, 1877, the plaintiffs in this suit becoming the purchasers of the property for Rs. 350. On the 4th October, 1877, the decree-holder objected to the sale on the ground that the order of the Subordinate Judge of the 14th September, 1877, had become publicly known in the village in which the property was situated and in neighbouring villages, and his subsequent order of the 19th September had not become so known, and that in consequence intending purchasers had not attended at the sale, and the property, which was worth Rs. 3,000, had only realized Rs. 350. On the 8th November, 1877, the judgment-debtors preferred similar objections to the sale; and they also objected to it on the ground that the sale had not been properly proclaimed. On the 25th May, 1878, the Subordinate Judge set aside the sale. From evidence taken by him it appeared that the decree-holder's pleader was not present when the order of the 14th September, 1877, was made; that he was told on that day by an official of the Subordinate Judge's Court that the sale had been postponed; and that he did not become aware of the order of the 19th September, 1877, until after the sale had taken place. The order of the Subordinate Judge setting aside the sale was in these terms: "The order postponing the sale was of course conditional, and the condition was not performed by the debtor who had applied for postponement. He has therefore no cause to complain. But it might be said that the decree-holder was prejudiced by the neglect of the debtor. I am satisfied that the order was not passed in the presence of the decree-holder's vakil, and the cause of this omission has been, I think, correctly stated by the decree holder's vakil. That omission has led to a mistake, or to a misrepresentation, and the misrepresentation has, as it appears from the documentary papers produced, produced detriment as much to the decree-holder

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as to the debtor. In this view, I think the sale must be set aside, but the debtor must pay interest at twelve per cent. on the amount fetched at the sale to this date, as also costs to the purchaser, who is quite innocent of the debtor's deception." On appeal by the auction-purchasers, the appellate Court in the first instance made an order confirming the sale, but subsequently, on review of judgment, made an order affirming the order of the 25th May, 1878, setting aside the sale. The present suit was instituted by the auction-purchasers against the decree-holder and the judgment-debtors in March, 1879, in the Court of the Munsif of Meerut. They claimed to have the order of the 25th May, 1878, set aside and the sale of the 20th September, 1877, confirmed, on the ground that that order was contrary to the provisions of Act VIII of 1859. The defendants set up as a defence to the suit that it was not maintainable, as the order of the 25th May, 1878, was final under s. 257, Act VIII of 1859, and that the sale, having taken place after it had been postponed, without the issue of fresh notifications, was illegal and had properly been set aside. The Court of first instance disallowed the first ground of defence, holding that the suit was maintainable; but allowed the second, and dismissed the suit. On appeal by the plaintiffs the lower appellate Court held that the order of the 25th May, 1878, setting aside the sale was final, under the provisions of s. 257 of Act VIII of 1859, and the suit was not maintainable. It was not contended before the lower appellate Court that that order was made *ultra vires*.

The plaintiff appealed to the High Court, contending that, "inasmuch as that order was passed *ultra vires* under s. 257 of Act VIII of 1859, a suit would lie for its cancelment; that the Judge was wrong in holding that the order was final, and no suit would lie to set it aside; and that the finality of an order under ss. 256 and 257 of Act VIII of 1859 depended on a compliance with the terms of those sections, and not otherwise." The Judges of the Division Bench before which the appeal came for hearing (PEARSON, J., and OLDFIELD, J.) differed in opinion on the point whether the suit was maintainable, the judgments of those Judges being as follows:—

PEARSON, J.—The sale appears to have been made under the authority of the order directing it to be held on the 20th Septem-

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ber, 1877. I do not find that any order was passed for postponement. The order passed on the judgment-debtor's application of the 14th *idem* merely intimated that, on certain conditions, an order for postponement of sale would be passed; but, those conditions not being fulfilled, an order rejecting the application for the postponement of the sale was passed on the 19th *idem*. I conclude, therefore, that the sale held on the 20th *idem* was lawfully held.

No irregularity in publishing or conducting the sale is pretended to have occurred; and no ground for setting aside the sale under ss. 256 and 257, Act VIII of 1859, existed. The first ground of appeal, *viz.*, that the order setting aside the sale was passed *ultra vires*, should, in my opinion, be allowed.

The words "shall be final" in s. 257 I take to preclude a regular or special appeal and not a suit, which is precluded in cases in which an order is legally passed under the section by the concluding terms of the section.

I would reverse the decree of the lower Courts and decree the appeal with all costs, and declare the plaintiff entitled to what he claims.

OLDFIELD, J.—The sale appears to have been set aside by the Subordinate Judge acting within his jurisdiction, under ss. 256 and 257, Act VIII of 1859, and the auction-purchaser cannot bring a suit to set aside the Subordinate Judge's order and have the sale confirmed in his favour, that order for setting aside the sale being final. The appeal is dismissed with costs.

The plaintiffs appealed to the Full Bench from the judgment of Oldfield, J., under cl. 10 of the Letters Patent.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—I am clearly of opinion that the suit in this case lies, and that in fact it is the only remedy against such an

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order as is complained of. The terms of s. 257 of Act VIII of 1859, to my mind, necessarily lead to this conclusion and are of themselves quite sufficient to determine the question. The objection to the sale was allowed, and the order to set it aside was, therefore, as provided by s. 257, final. But the very next sentence of the section shows plainly to my mind what is meant by this word "final," for it is there provided that, "if the objection be disallowed, the order confirming the sale shall be open to appeal," the order on which appeal shall be final, and in that case the party against whom the order is given shall be precluded from bringing a suit. Such are the provisions of this section, where the objection to the sale is disallowed. Where, however, the objection to the sale is allowed, as in the present case, the section provides that the order shall be final; and it is perfectly clear to me that that means "shall not be open to appeal," and that there may be a remedy by a new suit in such a case. In short, the section appears to me clearly to provide for two different remedies applicable to the two kinds of orders provided for. The first relates to the case where the objection is allowed and the order thereon final; in that case there is no appeal, but a suit will lie. The second kind of order is where the objection is disallowed, in which case the order may be appealed against, but a fresh suit is excluded. I therefore entirely agree with Mr. Justice Pearson and in the order he proposes, and I would therefore allow this appeal and reverse the order of the Division Bench with all costs.

PEARSON, J.—I adhere to the opinion expressed in my judgment of the 16th March last and have nothing to add thereto.

STRAIGHT, J.—It seems to me that this suit can properly be maintained and that the plaintiffs are entitled to succeed. No doubt the Subordinate Judge's order professed to be passed under ss. 256 and 257 of Act VIII of 1859, and it was not open to appeal; but I fail to find any prohibition in s. 257 of Act VIII of 1859 to the bringing of a suit by a party aggrieved by an order setting aside a sale, where such order has, as in the present case, been passed "*ultra vires*" and directly in contravention of the provisions of s. 256. The case of *Sukhai v. Daryai* (1) appears to me to be in

(1) I. L. R., 1 All., 374.

point and is an authority I see no reason to dissent from. I therefore agree with Mr. Justice Pearson that the appeal should be decreed with costs, and that the plaintiffs should have given them the relief they ask.

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OLDFIELD, J.—This is a suit brought by an auction-purchaser of property sold in execution of a decree on the 20th September, 1877, to have the sale maintained in his favour by cancelling the order of the Subordinate Judge who set aside the sale. The question is whether the suit is maintainable with reference to the provisions of s. 257, Act VIII. 1859. It appears that the sale had been notified to take place on the 20th September, 1877, but prior to that date the judgment-debtor applied to have the sale postponed for two months, and the Subordinate Judge passed the following order:—"The sale be postponed on the condition that the *talabána* fees for issue of fresh notifications are paid, and an abstract proceeding be sent to the officer conducting the sale for postponement." The judgment-debtor did not deposit the fees, and an officer of the Court reported the fact to the Subordinate Judge on the 19th September, the day before that fixed for the sale, and that in consequence the order for postponement of the sale had not been issued, and the Subordinate Judge on this report ordered that the judgment-debtor's petition for postponement be rejected and the sale should take place; the sale was held the next day, 20th September, and the defendant purchased the property put up for sale. Both decree-holder and judgment-debtors then put in objections to the sale. The decree-holder complained that the Court had ordered the postponement of the sale, and its order had gained publicity in the village and neighbourhood, and consequently the decree-holder and all the neighbouring zamindárs did not come to make purchase, and the property worth Rs. 3,000 had in consequence been sold for Rs. 350, and bought by a mukhtár and petition-writer of the Court; and he contended that a fresh notification ought to have been issued, and the order for postponement ought not to have been made in his absence without notice to him, and he asked to have the sale set aside on the above grounds. The judgment-debtors, besides urging similar objections, urged also that the sale-notifications had not been stuck up on the property or served. The Subordinate Judge held

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that the judgment-debtors had no real cause of complaint, as the order for postponement of the sale was conditional on their depositing fees, which they failed to do; but that the decree-holder's objection was valid, as the order was made in his absence, and had caused misapprehension, and the result had been to prejudice both him and the judgment-debtor; and he set aside the sale.

Now by the provisions of s. 257, Act VIII of 1859, an order for setting aside a sale passed on an objection made under s. 256, Act VIII of 1859, on the ground of material irregularity in publishing or conducting a sale, is final, and will preclude a suit on the part of the auction-purchaser for having the sale maintained in his favor.

On this point I may refer to cases,—*Kooldeb Singh v. Juggurnath Singh* (1); *Mobkoonissa v. Dewan Ali* (2); *Sookoomar Singh v. Kashee Singh* (3); and *Kooldeep Narain Singh v. Lukheen Singh* (4). In the last case Peacock, C. J., remarks:—"If the objection be allowed the order made to set aside the sale is final; that, as I understand it, means final for all purposes." It is only when a Court has set aside a sale otherwise than in the exercise of its jurisdiction under s. 257, Act VIII of 1859, that a suit has been allowed. Now in the case before us it appears to me indisputable that the Subordinate Judge, when he passed his order for setting aside the sale, was acting under the provisions of ss. 256 and 257, Act VIII of 1859. The objections made to the sale were clearly on the ground of irregularity in publishing the sale, and were so treated by the Subordinate Judge, whose order was made under s. 257, and who was thus acting in the exercise of his jurisdiction when he made the order to set aside the sale; and indeed, as the Judge has observed, it was not even contended in this suit that the Subordinate Judge's order was *ultra vires*; and I may here observe that the Judge has drawn a correct distinction between this case and that of *Sukhai v. Daryai* (5), where the Court, in setting aside the sale, does not appear to have been proceeding under the provisions of s. 257. In the case before us, the only objection which can be advanced against

(1) 2 W. R., Misc., 19.

(2) 4 W. R., 22.

(3) 13 W. R., 250.

(4) 9 W. R., 218.

(5) 1 L. R., 1 All. 374.

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the Subordinate Judge's order is that there had been no material irregularity of the nature mentioned in s. 256, inasmuch as the order given for postponement of the sale had never in fact taken effect, and therefore the Subordinate Judge ought to have disallowed the objections taken to the sale. Possibly that may be the case, but the error of the Subordinate Judge was one of judgment; he may have given an improper order on the merits of the objections, but his order was not given without jurisdiction, being clearly made under s. 257, Act VIII of 1859, being an order which he was competent to make under that section. The objections to sale were made under s. 256; the Subordinate Judge was bound to dispose of them under s. 257; and he did so dispose of them; and when thus acting the merits of his order cannot be made the subject of inquiry in a regular suit. The object of the law was expressly to prevent questions of this kind being re-opened on their merits, and I think the law would be defeated if the plaintiff were permitted to bring this suit. It appears to me that the plaintiff has no right other than to recover his purchase-money with interest under s. 258, Act VIII of 1859, and he has really no particular ground of complaint. He could again bid for the property at its re-sale, whereas on the other hand the maintenance of the sale under the circumstances would be a hardship and loss to the parties to the decree, if as is not improbable the property sold for a song in consequence of the impression having got abroad that the sale had been postponed. As Peacock, C. J., remarked in the case of *Kooldeep Narain Singh v. Lukheen Singh* (1) already referred to the setting aside the sale "would cause no great hardship: for, if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale: but he could not be greatly injured: for when a sale is set aside, the purchaser is entitled by s. 258 to receive back his purchase-money, with or without interest."

I must hold that this suit is not maintainable and has been rightly dismissed, and I would dismiss this appeal with costs.

Appeal allowed.

(1) 9 W. R., 218.

CRIMINAL JURISDICTION.

1880
August 26.

Before Mr. Justice Oldfield and Mr. Justice Straight.

EMPRESS OF INDIA v. DOSABHOY FRAMJI AND ANOTHER.

*Act III of 1880 (Cantonments Act), s. 14—"Soldier"—Sub-conductor—Sale
of spirituous liquor.*

A Sub-Conductor in the Commissariat Department is not a "soldier" within the meaning of s. 14 of Act III of 1880; and consequently the sale of spirituous liquor to the wife of such a person without the license required by that section is not an offence against that section.

THIS was a reference to the High Court, under s. 296, Act X of 1872, by Mr. W. Young, Sessions Judge of Bareilly. It appeared from the Sessions Judge's referring letter that on the 12th June, 1880, the Cantonment Magistrate of Bareilly had convicted and punished with fines one Dosabhoy Framji and one Ghulam Husain for offences against s. 14 of Act III of 1880, in that they had sold liquor to the wife of a European Sub-Conductor of the Commissariat Department, without the written license required by that section. The Sessions Judge was of opinion that these convictions were contrary to law, inasmuch as the term "European soldier" in s. 14 of Act III of 1880 did not include a Sub-Conductor of the Commissariat Department. The Sessions Judge observed in his referring letter as follows:—"There is no definition of the term 'European soldier' in the said Act III of 1880, and we have to search elsewhere for illustration. In common parlance the word 'soldier' is used to denote every person in the army from the Commander-in-Chief to the latest recruit, and also comprehends many who have long ago either definitively or conditionally renounced military life for civil pursuits. It is I think obvious that *this* is not the meaning contemplated by the use of the words 'European soldier' in s. 14, Act III of 1880, but they bear some less comprehensive meaning. By (e), Interpretation Clause of Act V of 1869, 'The Indian Articles of War,' it is laid down that 'soldier and soldiers include non-commissioned officers and all armed persons doing duty in the ranks of the army.' But it is to be observed that this definition does not include 'warrant-officers,' and Mr. Little is a

warrant-officers. This omission cannot be accidental, for only a few lines previously the same Act (V of 1869) contains a specification of persons to whom certain articles shall apply, and therein [vide Part I (d) of the said Act] warrant-officers are distinctly named as a class by themselves separate from non-commissioned officers, whose place in the list follows directly after them. Warrant-officers are of a grade as distinct from non-commissioned officers as are commissioned officers. Their duties, privileges, responsibilities are all distinct from those of non-commissioned officers, and Mr. Little is not an armed person, doing duty in the ranks. He wears no uniform, does not live in barracks, does not attend muster. To continue: if the provisions of the 'Mutiny Act' (41 Vic., c. 10) are considered, we find that there is a general clause declaring that in its interpretation 'all powers and provisions relating to soldiers shall be construed to extend to non-commissioned officers unless when otherwise provided.'—*Vide* s. 67, Mutiny Act. Here again the scope of the Act is *not* extended as far as warrant-officers, but only to non-commissioned officers. As far as the facts before me go, I do not think that there is good warranty for the extension of the term 'European soldier' in s. 14, Act III of 1880, so as to include by it 'warrant-officers,' as has been done by the Cantonment Magistrate. If the view then which I take is correct, the fines imposed by the lower Court were illegal."

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Mr. Chatterji for Dosabhoy Framji.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—We are of opinion that the views expressed by the Sessions Judge in his referring letter are correct, and that a Sub-Conductor in the Commissariat Department is not a "soldier" within the meaning of s. 14, Act III of 1880. The two orders passed by Mr. Petre on the 12th of June last must therefore be quashed, and the fines, if they have been paid, returned.

FULL BENCH.

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June 30.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

JANKI PRASAD (PLAINTIFF) v. BALDEO NARAIN AND OTHERS
(DEFENDANTS). *

Money-decree—Decree enforcing Hypothecation—Mortgage.

A suit on a bond in which immoveable property was hypothecated was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs with interest, "in accordance with" such agreement. *Held* (TURNER J., and OLDFIELD, J., dissenting) that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.

THE plaintiff in this suit claimed the moneys due on a bond dated the 18th December 1867, "by establishment and enforcement of his right as mortgagee in respect of the property pledged and mortgaged in the bond." He claimed to recover such moneys from the obligors of the bond, one Ghulam Ismail and his two sons, personally, and by the auction-sale of the property hypothecated in the bond. He joined as defendants in the suit Baldeo Narain, Jagat Narain, and Bishen Narain, persons who had, on the 20th July 1871, purchased a portion of such property at a sale in the execution of a decree against Ghulam Ismail and his sons, dated the 5th March 1866; and Abdul Ghanni, the person to whom Ghulam Ismail and his sons had transferred by sale another portion of such property, under an instrument bearing date the 20th June 1870. He alleged that the decree dated the 5th March 1866, was a mere money-decree. The auction-purchasers had obtained that decree in the Court of the Principal Sadr Amin of Allahabad in a suit on two bonds for the payment of money dated, respectively, the 17th January 1860 and the 14th September 1860, executed in their favour by Ghulam Ismail and his sons, in which the property in respect of which they were sued had been hypothecated to them. In that suit Ghulam Ismail and his sons filed a confession of judgment, the material part of which was as follows:—

* Regular Appeal, No. 75 of 1873, from a decree of T. W. Rawlins, Esq., Subordinate Judge of Allahabad, dated the 6th June 1873. Reported under the special orders of the Hon'ble the Chief Justice.

" We (the defendants) * * * * do declare that, whereas a regular suit filed by plaintiffs, claiming Rs. 5,589-6-6, under two deeds dated 17th January 1860 and 14th September 1860 respectively, in which all our zamindari, as detailed therein, is mortgaged, is pending against us (defendants) in the Principal Sadr Amin's Court, and whereas the claim of the plaintiffs is in all respects right and proper, we have, considering its justice, willingly and voluntarily executed this confession of judgment covenanting to pay, without objection, in two years the aggregate amount of their claims with costs and interest, to the extent as may be specified in the decision. The interest on the amount decreed until liquidation thereof shall be paid by us half-yearly to the plaintiffs at the rate of one per cent. per mensem, and we shall have the payment endorsed on the decree, and a petition informing the Court of the fact will be presented. We (the judgment-debtors) shall not claim a deduction of any payments made in part or whole, unless endorsed on the decree and communicated to the Court by petition. We shall not claim a deduction of the stipulated interest paid by us in the principal amount of the decree, and should we do so, it shall be false and illegal. The whole of the property as entered in the deed shall remain hypothecated and mortgaged till payment of the entire demand. If a regular suit is brought against us jointly or severally, by any creditors within the above stipulated period, or if an application for execution of decree is presented in Court by any decree-holder, or if a part or the whole of the mortgaged property belonging to us is farmed out or put up for auction-sale in default of payment of arrears of revenue, or if we (judgment-debtors) fail to pay interest mentioned above, or if the decree-holders find any obstacle, great or small, in the recovery of the decretal amount, they shall have the power at all times to duly realize, in a lump sum, the principal and interest due under the decree from us and from our zamindari property mortgaged and hypothecated in the deeds on which the claim is based, without waiting for the expiry of the fixed period, and in cancelment thereof, we (judgment-debtors) shall never have any objection to the annulment of the agreement. We have written this confession of judgment containing the foregoing conditions to stand as evidence. The correctness of the above facts can be ascertained from the pleader for the plaintiffs."

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The Principal Sadr Amin gave the auction-purchasers a decree on the 5th March 1866, which, after setting forth the particulars of their claim, and reciting that the case had been brought forward on that date for hearing and discussion in the presence of the pleaders for the parties, and that defendants had confessed judgment, proceeded in these terms:—"According to the confession of judgment, it was ordered that a decree for Rs. 5,589-6-6, the amount claimed, the costs and interest for the time the suit was pending, and on all the items to the date of realization be passed in favour of the plaintiffs against the defendants, who have promised to pay the amount due to the plaintiffs within two years in their confession of judgment admitted by the plaintiffs."

In the present suit the auction-purchasers set up as a defence that the decree of the 5th March 1866, under which they had purchased, was not a mere money-decree, but one which enforced an hypothecation of the property purchased by them of an earlier date than the date of the hypothecation which the plaintiff sought to enforce, and consequently that property was not liable to the hypothecation which the plaintiff sought to enforce. Upon the issue,—Is the decree of 1866 to be considered as a decree against the mortgaged property?—the Court of first instance held that that decree should be so considered, its decision upon this issue being as follows:—"I have no hesitation in finding for the defendant. The decree was given without any inquiry into the merits of the case on the defendant's full confession of judgment, and was evidently intended to be in strict accordance with it. The decree-holder, if he discovered the omission, should have applied to the Court to have it repaired; but if he failed to do this, possibly from ignorance of the terms in which the decree was couched, or misapprehension of the full meaning of the omission, it would be obviously inequitable to punish him by stereotyping a clerical error of the decree-writer."

The plaintiff appealed to the High Court, contending that the decree of the 5th March 1866 had been misconstrued by the Court of first instance, and that it was merely a decree for the payment of money. The Division Bench before which the appeal came for hearing (PEARSON, J., and TURNER, J.) referred to the Full Bench

the question whether that decree was a mere money-decree of not.

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Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath* for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*)
Babu *Beni Prasad*, Munshi *Sukh Ram*, and Mir *Akbar Husain* for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—The question referred in this case is whether the decree under which the property was sold was a mere money-decree, or whether it was a decree which could also be enforced against the property hypothecated in the bond. The facts and procedure which raised this question are somewhat peculiar, and there may possibly have been some mistake in preparing the decree in the terms in which it is drawn up. But taking it as it stands, I am clearly of opinion that it was a mere money-decree and nothing more. It was a decree passed on a confession of judgment. (The learned Chief Justice, after setting out the decree and the confession of judgment as set out above, continued): Such being the confession of judgment, it appears to me difficult to resist the conclusion that it was the intention of the parties to give the plaintiffs recovery against the property, as well as against the persons of their debtors, and that, if the decretal order stopped short at the money, and did not in its terms cover recourse against the property, that was simply a mistake on the part of the officer who drew it up. And such, I say again, was, I think, the probable intention. But we cannot construe a decree by means of supposed intentions, or presumptions, or inferences. We must look, and we must look alone, to the decreeing and operative words in which it is expressed, and so reading this decree I cannot extend its terms so as to make it enforceable against the hypothecated property in respect of the lien in the bonds, but must regard it as a mere money-decree. And as I suggested at the hearing, and notwithstanding any reasonable belief to the contrary, from the peculiar terms of the confession of judgment, the decree, by stopping short at the order for payment of the money only, may possibly have given effect to some under-

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standing or intermediate arrangement among the parties. Such an understanding or arrangement may not have been likely, but it is a possible contingency, and it is not at least violently opposed to the terms of the defendant's confession. But be that as it may, there is the decree itself in the terms in which it was allowed to go out, and for the purpose of the present reference it is immaterial whether it was drawn up in these terms by mistake or not. Nor can it be said that so far as it goes, it is not according to the confession of judgment, although it might have gone further according to the spirit and possible intention of that confession.

PEARSON, J.—We are asked whether the decree of the Court of the Subordinate Judge of Allahabad, dated 5th March 1866, in the original suit No. 98 of 1866 is a mortgage decree or a mere money-decree. The decree orders the payment to the plaintiffs of Rs. 5,589-6-6, the amount claimed, with costs and interest for the period during which the suit was pending and to the date of realization, by the defendants within two years, the period specified in the confession of judgment accepted by the plaintiffs. Having regard to the terms of the decree, it seems to me impossible to hold that it is more than a mere money-decree. The relief granted is money only, nor is it provided that the money may be realized by the sale of any particular property by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction; but it is not competent to us to rule that it is other than a mere money-decree in the terms in which it has been drawn.

TURNER, J. (OLDFIELD, J., concurring)—There can be no doubt that the Court intended to pronounce a decree in the terms of the confession of judgment, and that the confession contained a stipulation that, in the event of default in the payment of the instalments, the decree-holder should be at liberty forthwith to bring the property to sale. The intention of the Court then was that the decree should embody the relief. The operative part of the

decree runs as follows :—"In accordance with the confession of judgment filed by the defendants, it is ordered that a decree for Rs. 5,589-6-6, the amount of the claim, the costs, and interest pending the suit, and on the whole amount up to the date of realization, within the two years mentioned in the confession of judgment accepted by the plaintiffs, be passed in favour of the plaintiffs against the defendants." This decree is no doubt most inartificially prepared, but it contains in the judgment language sufficient to import, not a part only, but the whole of the terms of the confession ; and it being manifestly the intention of the Court and the parties that the whole of the terms should be incorporated in the decree, we consider ourselves warranted in pronouncing that the decree is not a mere money-decree, and that the sale effected under it was made in exercise of the power of sale for the enforcement of the security.

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SPANKIE, J.—We are asked whether the decree is merely a money-decree, or whether it includes all the terms of the compromise, and so declares the decree-holder's lien on the property hypothecated in the bonds on which the plaintiffs sued and the defendants filed a confession of judgment. It appears to me, looking at the terms of the decree, that it is confined to a decree for Rs. 5,589-6-6, the amount claimed, and costs and interest, "in favour of the plaintiffs against the defendants, who promise to pay the amount due to the plaintiffs within two years as specified in their confession of judgment accepted by the plaintiffs." I think that this is a money-decree, and that the words outside the decree, "and according to the confession of judgment filed by the defendants, it was ordered," cannot be said to extend all the terms of the confession of judgment to the decree itself.

APPELLATE CIVIL.

1880
March 31.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

DURGA PRASAD (PLAINTIFF) v. BALDEO AND OTHERS (DEFENDANTS).
Agreement without Consideration—Act IX of 1872 (Contract Act), s. 2 (d) and s. 25 (2).

The plaintiff sued to establish an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a

* Second Appeal, No. 1056 of 1879, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 1st July 1879, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 10th July 1878.

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bazár in which they occupied shops, in consideration of the plaintiff having expended money in the construction of such bazár. Such money had not been expended by the plaintiff at the request of the defendants, nor had it been expended by him for them voluntarily, but it had been expended by him voluntarily for third parties. *Held* that such expenditure was not any consideration for the agreement within the meaning of s. 2 (d) of Act IX of 1872, and the agreement did not fall within cl. (2), s. 25 of that Act, and was void for want of consideration.

IN or about the year 1862 a market for grain was established at Etáwah, and called Hume Ganj, after the Collector of the Etáwah district of that name. The plaintiff in this suit, Durga Prasad, had, at the instance of the Collector, assisted in the establishment of the market, erecting shops at his own expense and causing other persons to erect them, and causing persons to occupy such shops. Some of the occupiers of such shops set up business as agents for the sale of grain and other commodities, taking a commission of Re. 1-8-0 per cent. from the "*biparis*," or traders, who frequented the market. The plaintiff, on the ground apparently of his services in establishing the market, claimed to be "*chaudhri*" of the market, and as such to receive from such occupiers one-third of such commission. The plaintiff's claim appeared to have been recognized by the district authorities for in or about 1864 the Municipal Committee made an order declaring him entitled to such share of such commission. Such occupiers had, however, always disputed the claim, and in August 1864, at their instance, the order above mentioned was cancelled by the Local Government as illegal. With a view to settle the constant disputes between the plaintiff and such occupiers, the Municipal Committee suggested to the plaintiff that he should enter into an agreement with such occupiers respecting his claim. Accordingly the plaintiff produced an agreement in writing, which purported to be executed by the defendants in this suit, in which it was agreed by them that he should receive six annas of the percentage received by the occupiers of shops who acted as commission agents. This agreement was dated the 22nd June 1875. At the further suggestion of the Municipal Committee the plaintiff applied to have the agreement registered, but as many of the defendants denied that they had exceeded the agreement, registration of it was refused. The plaintiff was subsequently prosecuted by one of the

persons by whom the agreement purported to be executed for forging the signature of such person to the agreement, but the prosecution failed. In 1877 the plaintiff brought the present suit against the defendants, one hundred and eighteen in number, to establish the validity of the agreement. He stated in his plaint the following particulars respecting his claim:—"The plaintiff established two grain-markets at Etawáh, one called Hume Ganj, the other Ram Ganj, expending thousands of rupees in building shops and purchasing land, at the instance of the district authorities: the defendants rented shops in these markets, and set up as commission agents, receiving a commission of Re. 1-8-0 per cent. from the traders: in consideration of the plaintiff having expended thousands of rupees, the defendants fixed eight annas of such percentage as the plaintiff's '*haq*' which they used to pay him: in 1875, by mutual consent, six annas was fixed as the plaintiff's '*haq*,' and the defendants executed an agreement on the 22nd June 1875, according to which that amount was paid to the plaintiff: when the plaintiff desired to have that agreement registered, some of the defendants refused to register it, others denied having executed it; the plaintiff consequently was obliged to sue for the establishment of his right; accordingly the present suit has been brought on the agreement by which the defendants agreed to pay six annas out of the Re. 1-8-0 they receive as commission from the traders to the plaintiff who is known as '*chaudhri*' of the market."

Nineteen of the defendants confessed judgment; twenty-eight did not appear; and seventy-one defended the suit, on the ground, amongst others, that the agreement was void for want of consideration. The Court of first instance disallowed such defence, its decision on the issue arising from such defence being as follows:—

"Now it is proper for the Court to decide the defendant's plea (involved in the second issue of law), viz.—Is this document invalid with reference to s. 19, Act IX of 1872, or not? The Court thinks it is not, because in s. 2 (d), Act IX of 1872, consideration is defined as anything done or promised to be done or abstinence from doing that thing. In that case it should be admitted that the plaintiff, besides spending money from his own pocket in the establishment of 'Hume Ganj,' exercised great diligence and took

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great pains in having it tenanted, and this market gave the defendants an opportunity to get 'fees' (*arath*) by following their profession. In recompense of that trouble and diligence, if a portion of the fees was fixed for the plaintiff under the agreement in question as alleged by him, the consideration for that portion of the fees is that very diligence of the plaintiff." The Court of first instance in the event gave the plaintiff a decree against all the defendants excepting four of those who had defended the suit. On appeal by twenty-five of the defendants who had defended the suit, the lower appellate Court held that the agreement was void for want of consideration. It also held that the genuine character of the agreement was so doubtful that the agreement could not be supported; and it set aside the decree of the Court of first instance, and dismissed the suit. The material portion of the lower appellate Court's judgment was as follows:—"It is contended that Durga Prasad, the respondent, neither had done, was doing, or promised to do anything for the appellants; that the fees they derived from the '*biparis*' were not due to any exertions on his part; that if he built shops so did the appellants; that the efforts he may have made 11 or 12 years previously to establish the market-place were made to please the Collector and not at their desire; and that it was never agreed that they should receive certain fees in consideration of paying him certain dues. On behalf of the respondent it is argued that there was consideration within the meaning of s. 25 (2), Act, IX of 1872, and that the dues secured by the agreement were in compensation for something already voluntarily done by the respondent for the appellants, namely, the establishment of the market-place. I am unable to see clearly what it is that the respondent has done for the appellants. The market place was evidently established with great difficulty and in the face of much opposition mainly through the exertions of Durga Prasad, but this was to please the Collector not the appellants. The respondent was a person of standing and influence, and in consideration of his assistance the local authorities wished to recognize him as *chaudhri*, but their action in appointing him as such was disallowed by the Local Government on a petition being filed by several persons, among whom were some of the defendants. It is evident that the respondent was not

by any means acceptable to the persons immediately concerned. It might be considered that the appellants would not agree to pay the respondent fees unless they had gained something through him, and that the fact of their executing such an agreement afforded a presumption that he had done something for them. But, as will be noticed under plea 9, the agreement was extremely informal and vague, and there is much reason to doubt whether in fact it was executed by most of the defendants or not. It does not, for instance, recite any service done by the respondent or advantage accruing to the appellants through him. All the appellants are made to say in it is that they will not take more than Re. 1-8-0, out of which they will pay the respondent six annas. There was evidently no 'consideration,' as defined in s. 2 (d), and as evidently the circumstances do not bring the matter under cl. 2, s. 25 of Act IX of 1872. I think it desirable, notwithstanding that this finding is a sufficient reason for reversing the decree, to enter into that part of the 9th plea also which raises the question whether the deed was really executed by the appellants or not, and whether the confessing defendants are in collusion with the plaintiff or not. On behalf of appellants several peculiarities are pointed out, which tend to show that the document was not executed with the propriety and deliberation suitable where such considerable interests were concerned and usual on such occasions. It was executed on an eight-anna stamp and a penalty subsequently enforced of twenty times the proper stamp. To this a long slip of country paper was pasted upon which the signatures which could not be got on to the stamp were written; there were no marginal witnesses, and the agreement was not drawn up in the usual form. The stamp was purchased in the respondent's name, not, as is usual in such cases, by the executants. Several of the names are those of shopkeepers, not brokers, though the former take no fees. From all this the inference deduced on behalf of the appellants is that the document was not fairly and openly executed, and cannot be fully trusted, and the inference is not unreasonable. It is evident that the Municipal Committee did not feel sure of the genuineness and validity of the document as they wished to be, for they recommended the respondent to get it

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registered. When he produced it for registration, some of the alleged executants admitted their signatures but declined to register; others said they had signed a blank paper; and four denied having executed the document at all. Registration was refused and the order maintained on appeal. As to one of those who denied their signature, it was found by the Sessions Court, to which the respondent was committed for trial on the charge of forgery, that his signature had in fact been forged, and the document was impounded though the respondent was acquitted on the ground of ignorance and good faith. The evidence as to the signature consists of the statements of the writer of the document, of Muhammad Nazir, Tahsildar and Sub-Registrar, and of several of the confessing defendants, and is extremely weak, as might be expected from witnesses relating what they could recollect after a lapse of three years. No confidence can be placed under such circumstances in the genuineness of any of the signatures which are denied. It may be, and apparently is, the case that certain fees were paid to Durga Prasad, but there was a dispute about them for years. It is obvious that the respondent was strongly supported by the authorities, and it is not improbable that some of the appellants may have given a reluctant assent to the terms specified in the agreement and that others subscribed to them willingly. But I am of opinion that the contract it embodies is void for want of consideration, and that the whole document is not such as can be accepted as proving the alleged agreement, and that the other evidence is also insufficient to prove it."

The plaintiff appealed to the High Court, it being contended on his behalf that his past services and exertions in establishing the market were good consideration for the agreement; that the agreement was proved; and that he was entitled to a decree against the defendants who admitted the execution of the agreement, or could not prove that they had not executed it.

Mr. Conlan, the *Junior Government Pleader* (Babu Dwarka Nath Banarji), and Munshi Hanuman Prasad for the appellant.

Babu Baroda Prasad Ghose for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.)
was delivered by

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OLDFIELD, J.—The object of the suit is to establish an agreement in writing, dated the 22nd June 1875, alleged to have been executed by the defendants, whereby they agreed to pay certain commission to the plaintiff on the price of articles brought for sale in a market called Hume Ganj in Etáwah. The allegation of the plaintiff is that he established the Ganj at his own expense by request of the Collector at that time, built shops, which were occupied by some of the defendants, who received commission at Rs. 1-8-0 per cent. on articles brought for sale, and who used to pay eight annas per cent. to the plaintiff, and that the agreement now sought to be established has been executed to give effect to the understanding existing between the parties on the subject. Out of the defendants, nineteen confessed judgment, twenty-eight put in no appearance, and seventy-one defended the suit. The Court of first instance decreed the claim against all but five; twenty-five persons among the defendants appealed to the Judge, and these are the respondents in appeal before us. The grounds of appeal were substantially that a suit of the nature of the present suit to establish a right to fees as *chaudhri* of a bazár is not maintainable; that the absence of registration of the document is fatal to the maintaining of the suit; that the suit should be dismissed, since the document had been held to be a forgery by a Criminal Court; and that there was no consideration for the agreement under s. 25, Act IX of 1872, and it cannot be a binding agreement on the appellants under the circumstances under which it was drawn up. The Judge rejected all the objections in respect of the maintenance of the suit, but he found that there had been no consideration for the agreement, as the term is defined in s. 2 (d), Act IX of 1872, and that it was not such an agreement as might be valid with reference to the provisions of cl. (2), s. 25 of that Act; and he further held that the document had not been executed with proper formality and the deliberation suitable when such considerable interests were concerned, nor with the fairness or openness required to allow of its being fully trusted; and he reversed the decree of the first Court and dismissed the claim against the defendants.

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The plaintiff has presented a second appeal in this Court, making the defendants respondents who had appealed to the Judge. The objections are to the effect that the Judge's finding in respect of the invalidity of the agreement for want of consideration, and for want of proof of its proper execution, is wrong, and that he should not have dismissed the suit against those defendants who had not appealed to him.

The Judge's finding on the question of consideration is one which is not open to question in second appeal. To render the agreement valid as a contract, it must be shown that there was consideration as defined in the Contract Act, or if not, that the agreement comes within the exceptions provided for in s. 25. Now the deed is silent as to the character of the consideration for the promise, and the only ground for making the promise is the expense incurred by the plaintiff in establishing the Ganj; but it is clear that anything done in that way was not "at the desire" of the defendants, so as to constitute a consideration, and the Judge has very distinctly found that "the circumstances do not bring the matter under cl. 2, s. 25, Act IX of 1872," as has been contended. To bring it within the provisions of that clause, it must be shown that what was voluntarily done by the plaintiff was done "for the promisors" or "something which the promisor was legally compellable to do," and the Judge finds that this has not been shown. He says he does not see clearly what it is that respondents had done for appellant, and that what he did was to please the Collector. In fact, when plaintiff established the Ganj, the defendants were not in his mind, and that there was nothing done for them, for which compensation might be given. On the finding by the Judge there is no case for second appeal, and we cannot disturb the decree in respect of those defendants who have not been made parties to this appeal by the appellant. The appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,
Mr. Justice Oldfield, and Mr. Justice Straight.*

1880
August 12.

IN THE MATTER OF THE PETITION OF SHEO DIAL AND ANOTHER (PLAIN-
TIFFS) v. PRAG DAT MISE AND ANOTHER (DEFENDANTS).*

*Unregistered bond hypothecating immoveable property as collateral security
—Admissibility of bond as evidence of the Money-obligation—Effect of Non-
registration—Act III of 1877 (Registration Act), ss. 17, 49.*

A bond whereby a person obliges himself to pay money to another, and at the same time hypothecates immoveable property as collateral security for such payment, although the money-obligation is of the value of one hundred rupees and the bond is not registered, can be received in evidence in support of a claim to enforce the money-obligation.

THE plaintiffs in this suit claimed Rs. 217-10-0, principal moneys and interest, on an unregistered bond, bearing date the 7th August 1878. The material part of this bond was as follows:—"Bond executed by (defendants) of Manya Chak Delawal, tappa Chappia, pargana Rasulpur Gaus, in the district of Basti: we have on our free will and consent borrowed Rs. 199 of the current coin from (plaintiffs)..... we shall pay that amount without objection or pretext with interest at the rate of Rs. 9 per cent. per annum within one year: we have created an incumbrance on our share in the said mauza for this money, hypothecating it: as long as we do not pay the principal amount with interest in a lump sum, we shall not alienate the share by sale or mortgage, but will keep it in our possession: we have therefore executed this hypothecation-bond that it may stand as evidence." The plaintiffs did not seek to enforce the hypothecation contained in the bond, by reason that the bond was unregistered. The Court of first instance, deciding the suit on the merits, gave the plaintiffs a decree for the amount claimed, with interest at the rate stipulated in the bond for the period during which the suit was pending. On appeal by the defendants the lower appellate Court held that the bond, being unregistered, was not admissible in evidence, and dismissed the suit. Its reasons for so holding were as follows:—"The High

* Application, No. 24B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 12th December 1879.

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Court rulings of Calcutta and the North-Western Provinces, antecedent to 1872, and with reference to the late Act VIII of 1871, and its predecessors, laid down that the document could be received in evidence of the loan transaction, but not as affecting the hypothecated property, and that a decree for the money alone could be procured on the unregistered bond. This bond is, however, under the new Act III of 1877, and the only Full Bench High Court decision I know of, or which can be shown—*Matangini Dossi v. Ramnarain Sadkhan* (1)—takes the other, and what I have always thought the correct view, that unless the bond is distinctly divisible, a bond and a separate mortgage is not, in fact, an ordinary money-loan mortgage-bond, that document must be registered to make it valid, for any purpose affecting the loan, or the hypothecated property, and that, without being registered, it is so much waste paper. The bond in this case is no more divisible, or relating to more than one transaction, than the bond in the case quoted above: and the bond not being registered, cannot be accepted as evidence at all relating to any part of the transaction.” The plaintiffs applied to the High Court, under s. 622 of Act X of 1877, to revise the proceedings of the lower appellate Court on the ground (i) that its action in refusing to admit the bond as evidence of the claim for money was illegal; (ii) that in refusing to admit the bond in evidence the lower appellate Court had acted contrary to the provisions of Act I of 1872; and (iii) that the lower appellate Court should have taken into consideration the other evidence on the record.

The Division Bench before which the application came for hearing (PEARSON, J., and OLDFIELD, J.) referred it to the Full Bench for disposal.

Munshi *Kashi Prasad* and Maulvi *Mehdi Hasan* for the petitioners, plaintiffs.

Munshis *Hanuman Prasad* and *Sukh Ram* for the defendants.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—In this case the plaintiffs sue to recover Rs. 217-10-0, principal and interest due under a bond dated 7th August 1878. The bond purports to hypothecate immoveable

(1) I. L. R., 4 Calc., 83.

property; but not being registered is not evidence to that effect, and this is admitted by the plaintiffs, for in their plaint they, for that reason, waive their rights of hypothecation. The suit therefore was simply to recover the money on the personal covenant in the bond. The Munsif decreed the amount, but the Judge reversed his decree, holding that the bond could only be regarded as a bond with hypothecation which could not be separated from the money obligation, and he cited in support of this opinion *Matangini Dossi v. Ram Narain Sadkhan* (1).

From the decision of the Judge, however erroneous, there was, under s. 586 of the Civil Procedure Code, no second appeal to this Court, and the case therefore comes before us by application for revision under s. 622 of the Procedure Code, which clearly applies.

We have therefore to consider whether the Judge was right, and, if we consider he was in error, to make such order as we think fit. There cannot be a doubt that the Judge took a wholly erroneous view of the case. He misread the bond, mistaking it for an instrument in which the hypothecation of the immoveable property was inseparable from the personal covenant; and on the authority of the Calcutta case, which he cites in his judgment, he held that the bond, being unregistered, could not be received in evidence for any purpose; and no doubt, if the Judge's view of the legal character of the bond was right, the Calcutta case to which he refers was a direct authority, although, for so plain a proposition as that an unregistered bond of hypothecation of the value in this suit could not be received in evidence, no decided case or other legal authority was needed.

In the present case, however, the personal covenant in the bond is distinctly divisible or separable from its hypothecating clauses, and so regarded the bond is clear evidence of the debt. A very distinct ruling to this effect by this Court was referred to at the hearing,—*Seeta Kalwar v. Jagar Nath Parshad* (2). Another Calcutta case was referred to, which, however, has only an indirect application to the case before us,—*Nundo Kishore Lall v. Ramsookhee Koer* (3). There the question was one of limitation, it being

(1) I. L. R., 4 Calc., 83.

(2) H. C. R., N. W. P., 1868, p. 170.

(3) I. L. R., 5 Calc., 215.

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1880 held that, "although the document is not admissible as evidence in respect of any question relating to the property conveyed by it, still it may be good evidence between the parties for any other purpos"; and it appears to have been further held that, although under the Registration Act an unregistered instrument affecting property of the necessary value could not be received in evidence against the property, such a provision does not prevent the instrument being used for the purpose of showing that a fresh period of limitation has been acquired in respect to the instrument being an acknowledgment of a debt in writing. This case, however, does not appear to me to have any very direct bearing on the question before us; but the case decided by this Court in 1868 to which I have referred is a distinct authority, if authority was waiting in so plain a case as the present.

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The case should therefore go back to the Judge for decision on its merits, and, in disposing of these merits, he should take evidence of the making of the bond, the execution of which is denied by the defendants. But should the Judge hold that the bond has been proved, he will admit and apply it as evidence of the debt sued for.

OLDFIELD, J.—The instrument in question cannot under the terms of s. 17 of the Registration Act "affect any immoveable property comprised therein," or "be received as evidence of any transaction affecting such property"; but there is nothing in the section to prevent its being received in evidence of the debt to which it refers. The bond imposes a personal liability for the debt on the obligor, and also effects a mortgage of the property, and the two transactions are distinct. The instrument may be received in evidence of the former though not of the latter transaction. The distinction has been uniformly recognized by this Court. The case should be remanded to the lower appellate Court for disposal on the merits. Costs to follow the result.

STRAIGHT, J.—In my opinion, the Judge was in error in refusing to receive the unregistered bond as evidence of the personal debt due from the defendants to the plaintiffs. The case referred to by him—*Matangini Dossi v. Ramnarain Sadkhan* (1)—was decided

(1) I. L. R., 4 Cal., 83.

upon the special language of the document involved in the suit before the Court; and Garth, C.J., remarked that "it was doubtful whether, having regard to the terms of the loan, the defendant was personally liable for the money, and whether the only remedy of the plaintiff was not against the mortgaged property." But in the present case the bond creates a personal as divisible from a property obligation, and the loan can be separated from the hypothecation. The suit was simply for the money-debt and not for enforcement of lien, and the bond was not tendered in evidence for the purpose of proving a "transaction affecting property," but in order to establish that the loan had been made. The Judge should therefore dispose of the case upon the merits, and the case should be remanded for that purpose. Costs of the application to be costs in the cause. I may add that after discussion the pleader for the opposite party abandoned his contention, contrary to the view I have expressed as untenable.

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PEARSON, J.—I concur in the opinion expressed by Mr. Justice Straight, and would remand the case to the lower appellate Court for fresh disposal, with a direction that the costs of this application be costs in the cause.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

MANNU LAL (DEFENDANT) *v.* HARSUKH DAS (PLAINTIFF).*

1880
August 16.

Attachment in execution of decree—Suit to establish right.

B caused certain immoveable property to be attached in the execution of a decree. *M* objected to the attachment, claiming to be in possession of such property on his own account. The investigation of such claim which followed under s. 246 of Act VIII of 1859 took place as between *B*, the decree-holder, and *M*, *N*, the judgment-debtor, not being a party to it except in name. *M*'s objection was allowed in May 1871, but no suit was brought either by *B* or *N* to establish *N*'s right to such property. *H* subsequently obtained a decree

* Second Appeal, No. 267 of 1880, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 10th January 1880, reversing a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 30th June 1879.

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against *N* in 1887, and in execution thereof caused such property to be attached. *M* objected to the attachment and his objection was allowed in April 1878. In March 1879, *H* sued *M* for a declaration that a moiety of such property belonged to *N* and to have the order removing the attachment cancelled. *Held* that *N*'s right to a moiety of such property was not extinguished because he had not sued to establish it within one year of the making of the order of May 1871, in the execution proceedings of *B*, and *H* was competent to sue to establish such right.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. *Conlan, Colvin, Howard, and Dillon*, and *Munshi Hanuman Prasad* for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, and *Lala Jokhu Lal* for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) so far as it is material to the purposes of this report, was as follows:—

STRAIGHT, J.—This is a suit brought by the plaintiff-respondent to have one *Baij Nath*, his judgment-debtor, declared the owner of one-half of an orchard situate in the village of *Basahi*, zila *Mirzapur*, by cancelment of an order passed in the execution department on the 5th of April 1878. The Court of first instance dismissed the claim, but the Judge upon appeal decreed it, and the defendant *Mannu Lal* now appeals to this Court. The following are the material facts for consideration. In the year 1871, one *Bandhu Bai*, a banker of *Mirzapur*, having obtained a decree against *Baij Nath*, attached the garden now in question, but upon objection made by the present defendant-appellant *Mannu Lal* under s. 246, Act VIII of 1859, it was released. Upon reference to the proceedings in execution, it does not appear that *Baij Nath*, the judgment-debtor, was, except in name, a party to them, nor does it appear that he was summoned as provided by s. 246. The contest seems to have been solely between the decree-holder and the objector, who alleged himself to be in possession of the garden and in enjoyment of its fruits and produce. This possession the Subordinate Judge found to be established, and he accordingly allowed the objection, but no suit was brought either by *Bandhu Bai* or *Baij Nath* to establish the right of the latter to half the garden. The present

plaintiff, Harsukh Das, obtained a decree at Calcutta against Baij Nath in June 1877, and on the 29th January 1878, it was transferred to Mirzapur for execution. The garden was again attached, and thereupon, as before, Mannu Lal objected, and on the 5th April 1878, his objection was allowed, and the attachment was removed. Hence the present suit was instituted on the 26th of March 1879. The substantial point taken for the appellant is that, as no suit was brought by Baij Nath to establish his right to half the garden within one year from the passing of the order of the 12th May 1871, in the execution proceedings of Bandhu Bai, his right is lost and his remedy is gone, and the plaintiff therefore cannot now come into Court and seek to establish a title which has lapsed and is extinguished. Whatever weight this contention might have had if Baij Nath had actually been a party to the proceedings between Bandhu Bai and Mannu Lal in execution, which ended in the order of 12th May 1871, we cannot, when he was not a party to the proceedings, hold that the order of the Subordinate Judge was "given against him" in the sense of s. 246 of Act VIII of 1859. The questions investigated and decided as between the objector and the decree-holder were whether Mannu Lal was in possession of the garden and in enjoyment of the fruit and produce thereof, for and on his own account, and whether Baij Nath directly or indirectly had any interest in it available for execution of the decree. If Baij Nath had no such interest, then the Subordinate Judge was right in releasing the attachment; if he had, Bandu Bai might have brought a suit and established his right. No doubt, in the sense that the order releasing the property reduced the means of Baij Nath to satisfy the decree of Bandhu Bai, and left it in force against him for a larger sum, it may be said that the order was given against him as well as against the decree-holder, but as he was not formally made a party to the proceedings, as he might have been, if the provisions of s. 246 had been followed, we cannot hold him bound by the order, nor do we think it was incumbent upon him to bring a suit to establish his right, or that, having failed to do so, any interest he may have had must be taken to have lapsed. We are therefore of opinion that it is competent for the plaintiff-respondent to seek a declaration of Baij Nath's right to half the garden, and that the appellant's objection to the suit should not prevail.

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August 23,*Before Mr. Justice Pearson and Mr. Justice Oldfield.*LAJJA PRASAD AND OTHERS (PLAINTIFFS) v. DEBI PRASAD AND
ANOTHER (DEFENDANTS).**Pre-emption—Refusal to purchase.*

A person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith.

THE plaintiffs in this suit claimed to enforce a right of preemption in respect of a 4-anna village of a share called Garhia, basing their claim on an agreement recorded in the village administration-paper. This share, together with a house, had been sold by the defendant Debi Prasad to the defendant Muhammad Husain on the 23rd May 1879. According to the deed of sale the purchase-money of the property was Rs. 599. The plaintiffs alleged that the actual price of the property was not the amount entered in the deed of sale, as Rs. 150 had been returned to the defendant-vendee, and the actual price of the share was Rs. 400, Rs. 50 being the price of the house. They paid Rs. 400 into Court, claiming the property for that sum, but expressing their readiness to pay any amount which it might be determined was the actual price of the share. At the hearing of the case the plaintiffs gave evidence that Rs. 150 and the costs of preparing the conveyance and of its registration, Rs. 16, had been returned to the defendant-vendee. The Court of first instance decided that it had not been proved that any sum had been returned to the defendant-vendee, and that the actual price of the property was Rs. 599. It further found that the property had been offered for Rs. 600 to the plaintiffs by the defendant-vendor Debi Prasad, before it had been sold to the defendant-vendee, Muhammad Husain, and the plaintiffs had refused to purchase it at that price on the ground that it was not the actual price, but a fraudulent one. The Court held on this latter finding that the plaintiffs had lost their right of pre-emption in consequence of having refused to take the property at the price at which it had been offered to them and dismissed the suit.

* Second Appeal, No. 447 of 1880, from a decree of J. W. Quinton, Esq., Commissioner of Jhānsi, dated the 16th December 1879, affirming a decree of J. Deas, Esq., Assistant Commissioner, dated the 30th September 1879.

The decision of the Court on this point was as follows:—"But the evidence of plaintiff's own witness, Narainji, the patwari, is I consider fatal to plaintiff's claim. His evidence is that a few days before the sale to Muhammad Husain was effected, Debi Prasad offered the share to Lajja Prasad for Rs. 600, and that Lajja Prasad refused to buy the share at that price, urging that this price was not the real one. That Lajja Prasad did refuse the share on this ground is exceedingly likely, for it is proved that Debi Prasad had verbally agreed to sell the share to Lajja Prasad for Rs. 450, including the house. For some reason or other, whether it was, as I suspect, that plaintiff had not the money, or that Debi Prasad had received a higher offer from Muhammad Husain, the sale-deed was not executed in plaintiff's favour. Debi Prasad was it seems guilty of a breach of contract with Lajja Prasad for which the latter may claim damages, or owing to which he may sue for performance of the contract. As, however, previous to the sale to Muhammad Husain, plaintiff had been offered the share and house for Rs. 600, which offer plaintiff refused on grounds which are not proved to have existed, plaintiff cannot now claim to purchase at the price of Rs. 600 or Rs. 550 for the share alone. The right of pre-emption is based solely on contract; plaintiff refused to purchase the share for Rs. 600, the price offered by defendant; he is therefore now debarred from purchasing at that time." On appeal by the plaintiffs the lower appellate Court also decided that the property had been offered to the plaintiffs for Rs. 600, and they had refused to take it at that price, and had consequently lost their right of pre-emption. Its decision on this point was as follows:—"Maintaining that it (the price) was fraudulent and he would sue for pre-emption, he has failed to prove fraud, and has refused the offer at the alleged fraudulent price; consequently he has no cause of action."

On appeal by the plaintiffs to the High Court it was contended on their behalf that they did not lose their right of pre-emption by refusing to purchase the property at a price which they believed in good faith not to be the actual price.

Munshi Sukh Ram and Lala Latta Prasad for the appellants.

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Babu Jogindro Nath Chaudhri and Maulvi Mehdi Hasan for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—We are unable to concur in the opinion of the lower Courts that the plaintiffs have lost their right of pre-emption by refusing to purchase the share in question when offered to them at a price which, although it has been held on trial in this suit to be the price really paid by the defendant-respondent Muhammad Husain, they believed to be considerably in excess of the real price. They certainly had some reason for doubting whether the price at which it was offered to them was that at which it was really being sold to him; for the Court of first instance holds it to be proved that the defendant-respondent Debi Prasad had previously agreed to sell the share to the plaintiff Lajja Prasad for Rs. 450; and a good deal of evidence was produced on the part of the plaintiff to prove that Muhammad Husain received back from Debi Prasad the sum of Rs. 166. That evidence has not been accepted as satisfactory; but nevertheless the circumstances do not afford any ground for supposing that the plaintiffs' belief of the amount of the price being Rs. 599 was not entertained and expressed in good faith. The first Court remarks:—"That Lajja Prasad did refuse (the offer) on this ground, viz., that the price was not the real price but a fraudulent one, is exceedingly likely." There can be no doubt that he was anxious to purchase the share, and that he only objected to paying more than the real price. He is therefore, in our opinion, entitled to purchase it at what has been found to be the real price. He was justified in bringing the question as to what was the real amount of the price before a Court of Justice for determination, and it appears that in bringing this suit he declared his readiness to pay the amount which the Court might determine to be the real price.

The view taken by us is in accordance with, and is supported by, the ruling of the late Sudder Court in the case of *Eshri Das v. Binda Prasad* (1).

(1) N.-W. P. S. D. A. Rep., 1861, vol. i., part ii, p. 892.

As the plaintiffs have failed in their contention that Rs. 599 was not the real price, they must pay all the costs of the defendants in this suit ; but in modification of the decree of the lower Courts, we adjudge them the share in question by right of pre-emption and possession of the same, on condition of their depositing Rs. 599 for payment to the vendee in the first Court within a month from the date of the receipt by that Court of our decree.

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Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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RAM PRASAD RAM AND ANOTHER (PLAINTIFFS) v. RAGHUNANDAN
RAM AND OTHERS (DEFENDANTS).*

August 23.

Money-decree—Decree enforcing hypothecation of immoveable property—Construction of decree.

A decree was signed by the Court which made it in two places, at the top of the first page, and at the bottom of the third page. The second signature followed these words : —“Ordered that a decree be given for the plaintiff for the full amount claimed, being principal, together with costs and interest at six per cent. per annum.” The fourth page contained the following order:—“The claim for Rs. 10,614-11-0 be decreed by enforcement of hypothecation and auction-sale of talúqa *M*: it is further decreed that the defendants do pay the plaintiff Rs. 1,002-0-6 costs of the suit.” *Per* OLDFIELD, J. (STUART, C.J., dissenting), on the construction of such decree, that the order contained in the fourth page was part of such decree, notwithstanding that such page did not bear the Court's signature, as the Court's signature at the top of the page covered the whole document, and such decree was not a mere money-decree but one enforcing the hypothecation of immoveable property.

Per STUART, C.J.—That, construing such decree with reference to the plaint and judgment in the suit in which it was made, and not with reference to the Court's signatures, such decree was not a mere money-decree but one enforcing the hypothecation of immoveable property.

THE plaintiffs in this suit claimed to have an order dated the 5th April 1879 set aside, and to have a 3-anna 3-pie share of talúqa Mandyar “protected” from sale in the execution of a decree dated the 18th April 1877. It appeared that Jaisri Singh and Sheobarat Singh, defendants Nos. 2 and 3 in this suit, had assigned by sale to Raghunandan Ram, defendant No. 1 in this suit, a lease of certain immoveable property, cove-

* First Appeal, No. 33 of 1880, from a decree of Maulvi Mahmud Baksh, Additional Subordinate Judge of Gházipur, dated the 9th December 1879. Reported under the special orders of the Hon'ble the Chief Justice.

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nanting in the deed of sale, bearing date the 21st February 1871, to repay the purchase-money in case the assignee was unable to obtain possession of such property, and hypothecating their share of talúqa Mandyar as security for such repayment. Raghunandan Ram sued in virtue of this assignment for possession of such property. The suit was dismissed on the 31st May 1872, on the ground that the lease was a fabrication. On the 17th July 1873, and the 22nd June 1876, Jaisri Singh and Sheobarat Singh executed deeds of conditional sale of a 3-anna 3-pie share of talúqa Mandyar in favour of the plaintiffs. On the 18th February 1877, Raghunandan Ram sued Jaisri Singh and Sheobarat Singh in the Court of the District Judge of Gházipur to recover what he had paid them for the assignment of the lease, claiming to recover such sum by the sale of their share of talúqa Mandyar. On the 18th April 1877, the District Judge gave him a decree awarding him Rs. 10,614-11-0. On appeal the High Court, on the 11th February 1878, modified this decree, reducing the amount to Rs. 9,928-9-6. The plaintiffs in this suit applied for foreclosure of the conditional sales of the 17th July 1873, and the 22nd June 1876, on the 9th May 1877. The sales having been foreclosed, the plaintiffs sued Jaisri Singh and Sheobarat Singh for possession of a 3-anna 3-pie share of talúqa Mandyar, and obtained a decree in September 1878, in execution of which they obtained possession of such share on the 11th November 1878. Raghunandan Ram having applied for the sale of such share in execution of his decree dated the 18th April 1877, the plaintiffs objected, and on the 5th April 1879, the Court executing the decree made an order disallowing their objections. The plaintiffs thereupon instituted the present suit against Raghunandan Ram (No. 1), Jaisri Singh (No. 2), and Sheobarat Singh (No. 3). They alleged that the decree of the 18th April 1877 was merely one for money, and did not enforce the hypothecation of a share of talúqa Mandyar belonging to the defendants Jaisri Singh and Sheobarat Singh. The Court of first instance held that that decree did enforce the hypothecation of two annas three pies of the 3-anna 3-pie share of talúqa Mandyar belonging to those defendants, and gave the plaintiffs accordingly a decree only in respect of a one-anna share of the property in suit.

The plaintiffs appealed to the High Court, and contended again, amongst other things, that the decree of the 18th April 1877 was a mere money-decree and did not enforce any hypothecation of property. The terms of this decree are sufficiently stated in the judgment of the High Court.

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Mr. Conlan and Pandit Bishambhar Nath for the appellants.

Munshis Hanuman Prasad and Sukh Ram for the respondents.

The following judgments were delivered by the High Court:—

OLDFIELD, J. (After stating the facts and disposing of the first three grounds of appeal, continued:—The last objection is that the decree made in the suit brought by defendant No. 1 against his assignors is not a decree for the enforcement of the hypothecation by sale of the property. The last or fourth page of the document which purports to be the decree of the Court contains an order to this effect:—"The claim for Rs. 10,614-11-0 be decreed by enforcement of hypothecation and auction-sale of taluqa Mandyar: it is further decreed that the defendants pay to the plaintiff Rs. 1,002-0-6 costs of the suit." Then follows details of the sums and at the bottom the signature of the munsarim of the Court. It is contended, however, that this portion, as it does not bear the signature of the Judge, cannot be held to be any part of the decree. I find that the signature of the Judge is in two places on this document; at the top of the first page, and at the bottom of the third page; and although it is wanting at the bottom of the last page, there cannot be any doubt that the order on that page is part of the decree; we cannot say that one part of the document is the decree and not the other, the whole must be taken to be the decree of the Court, and read as one instrument. The entries in the last page are merely details of matters decreed, which the general order in the judgment which is repeated at the bottom of the third page was intended to include. The Judge's signature at the top of the first page will cover the whole document. The mere circumstance of a signature of the Judge being affixed at the wrong place, supposing such to be the

1880 case, will not nullify the document as the decree of the Court. A
 RAM PRASAD reference which we made to the Judge shows that the entire docu-
 RAM ment including the disputed portion was intended to be the decree
 v. in the case; and I find that the disputed portion is nothing more
 RAGHUNAN- than a transcript from a paper prepared in the office as represent-
 DAN RAM. ing the decretal order in the case, which was signed and attested
 as correct by the pleaders of both sides. It appears, moreover,
 that the judgment-debtors, now represented by the appellants,
 preferred an appeal from this disputed decree to this Court, in
 which they treated the whole document as the decree of the
 Court, and their objections were particularly directed against the
 hypothecation. Under all the circumstances I do not think we can
 hold that the decree is not one enforcing the hypothecation, the
 objection taken being, in my opinion, technical.

STUART, C.J.—My honourable colleague, Mr. Justice Oldfield, has correctly stated the facts and the procedure in this appeal, but I feel great difficulty in accepting the reasoning by which he meets the objection taken in respect of the decree of the 18th of April 1877, by the Judge of Gházipur, not being a decree for enforcement of hypothecation of the property in suit. At the first hearing of the case we felt this difficulty so strongly that we directed an inquiry to be made of the Judge of Gházipur, whether the document purporting to be the vernacular decree of the 18th of April 1877 is in the form authorized by him, and whether in fact it is the decree which he passed in the suit. We further directed that it be pointed out to the Judge that that part of the decree attested by his signature contains merely an order decreeing the full amount claimed, principal and interest, with costs. We further directed it to be pointed out to the Judge that the remaining portion of the document appears to express an order that the money claim be decreed by enforcement of the hypothecation, but that this part of the document is not attested by the Judge's signature, and we desired that the Judge should inform us if this part of the document, being without his signature, was authorized by him so as to form part of the decree which he passed, and if so, why it was not signed by him. This order making these inquiries is dated 5th July 1880.

In reply to these inquiries the Judge addressed a letter to the Registrar dated the 13th July 1880, and a more unsatisfactory communication I think I never read. Instead of answering our inquiries in precise terms he contents himself with informing us that the decree in question "is in the form now in use in this district, and is in accordance with the purport of the judgment which I passed in the case," and then he refers to the Court's Circular Order dated the 28th of June 1876, with the requirements of which he appears to suggest, although erroneously, the form of this decree complies.

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Whether the decree, in regard to the intention of the Court which passed it, can be helped by the terms of the Judge's judgment in the case is a question I shall presently consider; but I cannot allow the Judge's statement that this decree is in accordance with the purport of his judgment to pass without a distinct contradiction. The decree is on the face of it clearly and distinctly not in accordance with the purport of the judgment, but, if a decree at all, is a mere money-decree. Here are its terms:—"Ordered that a decree be given for the plaintiff for the full amount claimed, being principal, together with costs and interest at the rate of Rs. 6 per cent. per an num," and this is signed "J. W. Power." It will be observed, it is not said, "that a decree be given to the plaintiff as claimed by him," the particulars of such claim being set out, or, "that a decree be given to the plaintiff with interest and costs," terms which also, in my opinion, and, if preceded by particulars of the claim, would have carried the hypothecation. But the decree is simply given for the full amount claimed, and it seems to me idle to dispute that such a decree taken by itself is mere money-decree and nothing more, containing no adjudication on the particulars of the claim as even recited by itself. This decree, however, is followed by some writing on another page wholly without the signature of the Judge or any other official form of authentication, to the effect that "the claim for Rs. 10,614-11-0 be decreed by enforcement of hypothecation and sale of talúqa Mandyar." That such a decree, if it deserves the name, is not in accordance with the definition of that term as given in the last edition of the Procedure Code, no one could for

1880 a moment contend, "decree" there meaning the "formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, where such adjudication, so far as regards the Court expressing, it decides the suit or appeal." Nor is it in accordance with the definition of decree in the first edition of the Procedure Code, although it comes nearer that definition, where it is described as "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." But for another reason neither of these definitions apply, for the decree in question is dated the 18th April 1877, and the validity of it must therefore be determined by the provision respecting decrees in Act VIII of 1859. Section 189 of that Code provides that: "The decree shall bear the date on which the judgment was passed. It shall contain the number of the suit, the names and description of the parties, and *particulars of the claim*, as stated in the register of the suit, and shall specify *clearly* the relief granted or other determination of the suit." Legal requirements which the decree in question in no way satisfies.

Now, according to the Judge's reply, the form given to this decree is according to the practice of his Court in the preparation decrees in suits in which hypothecation is claimed. I can only say that, if it really be so, the practice is a very bad one, and altogether erroneous, and that the sooner it is corrected the better. The decree should in terms decree the whole claim as actually made by the plaintiff, or such portion of the claim as the Court may adjudge, as distinguished from that which is refused, and which it should also specify, or otherwise as may be shown by the terms used to be consistent with the result of the suit. Here the intention of the Court may have been to give recovery in the terms of the plaintiff. But the form in which the decree itself has been drawn up has caused the difficulty we have had to consider; and that is a difficulty which is not merely technical in a sense extrinsic to the merits of the case, but is a technicality which covers the whole substance and merits of the case so far as the very words used in the decree are concerned.

The statement in writing following the formal decree (on the fourth page) and which appears to recognize the hypothecation is

regarded by my honourable colleague as purporting to be the decree of the Court, and possibly it may have been so intended, but if so intended I can only say that the intention has not been adequately carried out. This might have formed part of the decree, but being unauthenticated by the signature of the Judge can only be regarded as a mere memorandum or something which it was intended should be considered in making up the decree, but which at the last moment was either deliberately abandoned or accidentally omitted. Nor to the argument of my colleague derived from the position of the signatures on the document under consideration can I accede. There are only two signatures by the Judge, one at the top of the decree and the other at the end of the formal decretal order, and which it is fairly contended must be the measure of the decree itself. The last page which appears to recognize the hypothecation in decreeing language is without any signature whatever; and the contention that this is covered by Mr. Power's signature at the top or commencement of the decree cannot, in my judgment, be allowed. If there had been no other signature than this, then there would have been some plausibility in the argument that it related to and covered the whole contents of the document, but the other signature placed at the end of the former decretal order, and before the contents of the fourth page, cannot of itself, to my mind, save the hypothecation.

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If then, in regard to the real intention and motives of the parties and the justice of the case, we must hold the plaintiff entitled to a decree which will give him the benefit of the lien provided by his bond, we must put his right to that on other grounds.

There are cases in the books, one notably, *Toona v. Kurreemun* (1), in which Sir Barnes Peacock held that the decree might be so amended as to be made consistent with the judgment, the Court remarking:—"We think it would be a very dangerous thing to uphold decrees at variance with judgments, and to hold that a Judge, when he finds that the decree varies from his judgment, is not able to set the decree right. It is a power which all Courts possess to amend their records when there is anything to amend by. In this case the decree ought to be amended to

(1) 2 Wym., 100.

1880 make it agree with the judgment which was recorded." There are also cases in this Court in which we have held that, when the decree is doubtful or ambiguous, or expressed in terms so general as to make it difficult to understand what was meant, the decree may be read with the plaint and with the record; and I myself have so ruled in two cases,—*Pan Koer v. Bhagwant Koer* (1); *Lachman Singh v. Mohan* (2). And although the formal decree in the present case is less ambiguous than sometimes happens, I am not indisposed to apply such a solution to the difficulty. It will be observed that, although the decree in terms is for the "full amount claimed," that is not stated in any exclusive sense, that is to say, the claim being regarded chiefly in a money point of view is fully allowed, and it is not said that the plaintiff is to recover that full amount against the defendants personally, and not by means of the security, on the basis of which they brought their suit. Nor is there anything in the record to show that such was the real intention. There is in fact nothing so limiting the plaintiff's claim, saving and except the wording of the decree itself and the uncertainty occasioned by the careless manner in which so serious a matter as a right of hypothecation is made a mere endorsement without signature. These views also derive force from the fact that this very decree was made the subject of an appeal to this Court—Regular Appeal No 90 of 1877—before a Bench of which my honourable colleague in the present case was one of the Judges, Mr. Justice Turner being the other, and in which appeal, although the sum was reduced from Rs. 10,614-11-0 to Rs. 9,908-9-6, and no question respecting its validity appears to have been raised, this decree appears to have been treated as a decree giving recovery on the lien created by the hypothecation. This circumstance not only throws light on what was really intended by the issues in this case, but also demonstrates the confusion in which we would land the parties and their pleas by coming to a different conclusion in the present suit. That is if possible to be avoided, but it can, in my opinion, only be avoided by reading the decree in connection with the plaint and proceedings, and not by any argument derived from the position of the Judge's signature.

(1) H. C. R., N.-W. P., 1874, p. 19.

(2) I. L. R., 2 All., 497

There is one other consideration which I would wish to mention in favour of reading this decree in the light of the plaint and judgment. The decree as formally drawn up distinctly separates, by the formal heading of the word "ordered," the final decretal order from the rest of the foregoing decretal statement. This form, where the decree is in general terms or in the least ambiguous, is apt to mislead, and in fact has given rise to all the discussion we have had on this subject. On the other hand, I observe that the same decretal order is made part and parcel of the Judge's judgment of which it is simply the conclusion, its only separation from what goes before being the accidental circumstance of its being made the subject of a *new* (and concluding) sentence. The conclusion I come to is that the intention of the Court and the parties really was to give recovery to the plaintiff on the hypothecation in his bond, and that we should not allow such intention to be defeated by any awkward or inartificial methods or forms which may unhappily be in use in the district of Gházipur, but that we may regard the decree in the light and to the effect I have explained.

For all these reasons the decree of the 18th April 1877 may, in my judgment, be executed against the hypothecated property.

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 September 1.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

RAHMIT RAI (JUDGMENT-DEBTOR) v. SATGUR RAI AND OTHERS
 (DECREE-HOLDERS).*

*Execution of decree—Acknowledgment in writing—Act XV of 1877
 (Limitation Act), s. 19.*

An application for the execution of a decree is an application in respect of a "right" that is to say, the "right" of the decree-holder to execution, within the meaning of s. 19 of Act XV of 1877. An application in writing by a judgment-debtor for the postponement of a sale in the execution of the decree and the issue of fresh notifications of sale is "an acknowledgment of liability," within the meaning of the same section, in respect of such "right."

*Second Appeal, No. 75 of 1879, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 12th July 1879, reversing an order of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 10th May 1879.

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Such an acknowledgment, when the application is signed by the pleader expressly authorized to make it, is "signed" by an "agent duly authorized in the judgment-debtor's behalf," within the meaning of the same section.

APPLICATION for the execution of the decree of which execution was sought in this case had been made on the 28th May 1875. In pursuance of that application certain immoveable property belonging to the judgment-debtor was proclaimed for sale on the 20th August 1875. On the 13th August 1875, an application was made by a pleader on behalf of the judgment-debtor for the postponement of this sale. This application, after stating that application for the execution of the decree had been made, to recover Rs. 756-3-6, and that the 20th August 1875 had been fixed for the sale of the judgment-debtor's property, proceeded as follows:—"Petitioner begs to submit that this is his ancestral property, and is the only means of livelihood for him and his children; and his children, if it be sold, will be deprived of their daily bread: petitioner has asked the decree-holders to allow him time to make some arrangement for paying off the debt, and, in consideration of the property being ancestral, they have agreed to allow time; and so the pleader for the decree-holders has signed this application, to show that the decree-holders have agreed to such grant of time: petitioner therefore prays that one month's grace be allowed to him, that the sale be fixed for the 26th September 1875, and fresh notice of sale may be issued, and that a *rubkar* may be sent to the Revenue Court to postpone the sale fixed for the 20th August 1875: the Court may be pleased to issue a second notice fixing the sale for the 20th September 1875." The pleader making this application on the judgment-debtor's behalf did so under a *vakalat-nama* specially authorizing him to make it. On the 20th August 1875, a second application was made on the judgment-debtor's behalf for the postponement of the sale, but it is not necessary for the purposes of this report to state the contents of such application. On the 29th July 1878, the next, or the present, application for the execution of the decree was made. The judgment-debtor objected to this application on the ground that it was barred by limitation. The decree-holders contended, with reference to s. 19 of Act XV of 1877, that limitation should be computed, not from the date of the previous application for execution, but from the dates of the judg-

ment-debtor's applications of the 13th and 20th August 1875, as those applications contained acknowledgments within the meaning of that section which created a new period of limitation to be computed from those dates; and that, so computing limitation, the present application for execution was within time. The Court executing the decree disallowed this contention, holding that the provisions of s. 19 of Act XV of 1877 were not applicable in the case of an application for the execution of a decree, and that the application for the execution of the decree was barred by limitation. On appeal by the decree-holders the lower appellate Court held that the provisions of s. 19 of Act XV of 1877 were applicable, and the application for execution was within time. The judgment-debtor appealed to the High Court, impugning the decision of the lower appellate Court. The Division Bench before which the appeal came for hearing (PEARSON, J., and OLDFIELD, J.) referred the following questions to the Full Bench for disposal, viz., "(i) whether the provisions of s. 19 of Act XV of 1877 apply to an application for execution of decree; (ii) whether the judgment-debtor's applications of the 13th and 20th August 1876 amount to acknowledgments of liability in respect of a right; and (iii) whether the signature of the pleader on the applications is that of an agent duly authorized on the judgment-debtor's behalf."

Munshi *Hanuman Prasad* and Mir *Akbar Husain* for the appellant.

Mr. *Niblett* and Babu *Jogindro Nath Chaudhri* for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—I am clearly of opinion that the three questions put to us by the order of reference must all be answered in the affirmative. It is beyond all doubt that s. 19, Act XV of 1877, applies to an application for execution of decree, and such application was, in the present case, validly and effectually made by the judgment-debtor's vakil by his petition dated the 13th August 1875, his *vakalat-nama* having been given for the express purpose of such an application. Such application was therefore an acknowledgment within the meaning of s. 19, Act XV of 1877, and it was an acknowledgment in respect of a right.

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Two Calcutta decisions were cited at the hearing, one by Markby and Prinsep, JJ., in *Kally Prosonno Hazra v. Heera Lal* (1), and the other by Morris and Prinsep, JJ., in *Mungol Prashad Dicit v. Shama Kanto Lahory Chowdhry* (2). These were, however, made under the former limitation law, and they have no application to a case like the present, even if we concurred in the law they lay down, which I am not prepared to say I do.

OLDFIELD, J.—S. 19 of the Limitation Act appears to me to apply to an application for execution of a decree. The applications referred to in the section can be no other than those mentioned in the second schedule of the Act, when they are applications in respect of any property or right, and an application to execute a decree is an application in respect of a right. My answer to the other questions is in the affirmative.

STRAIGHT, J.—In reply to the first question I would say that, in my opinion, the provisions of s. 19, Act XV of 1877, do apply to an application for execution of decree. The words are “suit” or “application,” and they have reference to the schedules in the third division of which, in art. 179, is to be found application for execution of a decree, and such application may, I think, properly be held to be in respect of the “right” of the decree-holder to execute his decree. It must also be observed that the words are “application in respect of any right,” and I see no reason to limit them in the manner suggested by the pleader for the appellant. The petition of the judgment-debtor of the 13th August 1875 is, I consider, a sufficient acknowledgment of his liability in respect of the right of the decree-holder to immediate execution of his decree, and would afford a fresh starting point from which limitation would run. The *vakalat-nama* was specially given to the pleader by the judgment-debtor for the purpose of filing the petition of the 13th of August, and he was therefore an agent duly authorized on the judgment-debtor’s behalf.

PEARSON, J.—I concur in the views expressed by my colleague Mr. Justice Straight on the questions referred to us.

Appeal dismissed.

(1) I. L. R., 2 Cal., 468.

(2) I. L. R., 4 Cal., 708.

CRIMINAL JURISDICTION.

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September 1.*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

EMPRESS OF INDIA v. TIKA SINGH.

Discharge—Revival of Prosecution—Place of inquiry or trial—Enticing away Married woman.

A person was prosecuted before a Criminal Court in the Panjab for enticing away a married woman, with a criminal intent, an offence punishable under s. 498 of the Indian Penal Code. Such prosecution was legally instituted in such Court and such offence was properly triable by it. Such Court discharged such person under the provisions of s. 215 of Act X of 1872. Subsequently it appeared that such person was detaining such woman at a place in the North-Western Provinces, and he was prosecuted before a Criminal Court of the district in which such place was situated for the same offence as he had been prosecuted for before the Criminal Court in the Panjab, viz., enticing away such married woman, and was convicted of that offence. *Held* that, although his previous discharge did not bar the revival of a prosecution for the same offence, such prosecution could only be revived in the Panjab Court, and he could not be convicted under the latter part of s. 498 of the Indian Penal Code for detaining an enticed woman until the enticing had been proved, and such conviction had been properly set aside by the Court of Session.

TIKA SINGH was charged before the Extra Assistant Commissioner of Jalandhar, in the Panjab, under s. 498 of the Indian Penal Code, with having, on or about the 3rd February 1880, enticed away one Jas Kuar, the wife of one Ganga Singh, with a criminal intent. Such offence was alleged to have been committed by him at Bindraband in the Jalandhar district. Jas Kuar was not produced as a witness in the case, as she could not be found. The Extra Assistant Commissioner, being of opinion that the charge was not proved, directed that Tika Singh "should be released immediately from the security and liability taken from and imposed on him." Subsequently Jas Kuar was discovered in the Bijnor district, in the North-Western Provinces, in which district Tika Singh resided. On the complaint of her husband, Tika Singh was tried before the Assistant Magistrate of Bijnor, under s. 498 of the Indian Penal Code, on the same charge as was made against him before the Extra Assistant Commissioner of Jalandhar, viz., "that he on or about the 3rd February 1880 did entice away Jas Kuar, the wife of Ganga Singh," and was convicted by the Assistant Magistrate of Bijnor on that charge. On appeal by Tika Singh, the Sessions Judge of Bijnor, Budaun Division (Mr. C. Daniell), on the 17th April 1880, set aside his conviction, and directed his release. The

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Sessions Judge's grounds for setting aside the conviction will appear from the following extract from the letter of the Magistrate of the Bijnor district, Mr. C. W. Mellor, referring the case directly (the Sessions Judge having refused to refer it at his instance) to the High Court for orders under s. 297 of Act X of 1872:—"The case for the prosecution was as follows:—The complainant charged Tika Singh with abducting his wife: he had originally instituted the charge in a Court in the Panjab, but this had fallen through as the woman could not be found: complainant then petitioned the Bijnor Magistrates: it was notorious that the woman was kept in hiding in or about Nagina in this district, and after a while she was arrested as an absconding witness, and the accused convicted: the Sessions Judge discharged the accused on appeal on the ground that (supposing accused had not been acquitted of the offence by the Panjab Court under s. 220, Code of Criminal Procedure) the prosecution, though it could be revived under s. 215, Explanation II, of the Code of Criminal Procedure, could only be so revived in the Court in the Panjab in which it was originally instituted, and that therefore the Bijnor Magistrate acted without jurisdiction: the Judge says that there is nothing in s. 67, Code of Criminal Procedure, which conflicts with this view, but I can see nothing in s. 67 or in s. 215 which favours the view or prevents the prosecution being revived in Bijnor. The Judge says the trial could not be held partly in one district and partly in another, but the trial in Bijnor was complete in itself; it did not require to be supplemented by the proceedings in the Panjab Court, which could not be said to constitute a part of the trial: the Judge also appears to me to have entirely overlooked the fact that the offence charged was a continuous one; that the accused (if guilty) was committing the offence every day so long as he detained or concealed the woman; and that therefore the offence for which he was tried here was in reality committed after the proceedings in the Panjab Court; and that therefore any previous proceedings held in the Panjab Court could by no possibility act as a bar to a charge being made against the accused here: the Judge also remarks that he does not consider it necessary to delay passing orders 'until the prosecution can prove whether the Extra Assistant Commissioner's order was issued under s. 215 or s. 220, Code of Criminal Procedure'; it appears to

me that it was for the accused to prove that he had already been tried and acquitted, and not for the prosecution to prove the negative: suppose an accused person were to allege a previous acquittal without specifying the place and date or producing a copy of the order, is the prosecution to ransack the record of every Court in India until it can satisfy the Court that the alleged defence is a false one"? The High Court having procured the record of the trial of Tika Singh before the Extra Assistant Commissioner of Jalandhar, the reference was laid before Pearson, J., and Oldfield, J., for disposal, by whom the following order was passed:—

PEARSON, J.—Having examined the records of the Court of the Extra Assistant Commissioner of Jalandhar, we come to the conclusion that he discharged Tika Singh under the provisions of s. 215, Act X of 1872. In the case tried by that officer, no charge was drawn up, and Tika was not acquitted, but only released. His discharge does not bar the revival of a prosecution for the same offence, but it can only be revived in the Court in which it could legally be instituted. That offence was committed in Philor and was properly triable by the Jalandhar Court. Tika was not tried in the Court of the Assistant Magistrate of Bijnor for concealing or detaining a woman who had been enticed away with criminal intent under the latter part of s. 498, Indian Penal Code, but for the very same offence of which he had been accused at Jalandhar, viz., "that you, on or about the 3rd February 1880, did entice one Jas Kuar, the wife of Ganga Singh, with criminal intent." It is, moreover, obvious to remark that he could not be convicted of detaining an enticed woman until the enticing had been proved. The orders passed by the Sessions Court appear to us therefore to be right. With these remarks the record may be returned.

APPELLATE CRIMINAL.

1880
October 5.

Before Mr. Justice Pearson and Mr. Justice Straight.

EMPRESS OF INDIA *v.* ABDUL HAKIM.

Right of Private Defence—Murder.

A head-constable, making an investigation into a case of house-breaking and theft, searched the tents of certain gipsies for the stolen property, but discovered nothing. After he had completed the search, the gipsies gave him a

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certain sum of money, which he accepted, but at the same time, not deeming it sufficient, he demanded a further sum from them. They refused to give anything more on the ground that they were poor and had no more to give. Thereupon he unlawfully ordered one of them to be bound and taken away. On his subordinates proceeding to execute such order all the gipsies in the camp, men, women, and children, turned out, some four or five of the men being armed with sticks and stones, and advanced in a threatening manner towards the place such gipsy was being bound and the head-constable was standing. Before any actual violence was used by the crowd of advancing gipsies the head-constable fired with a gun at such crowd when it was about five paces from him, and killed one of the gipsies, and having done so, ran away. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased had he released the gipsy he had unlawfully arrested and withdrawn himself and his subordinates, or had he effected his escape. *Held* that such head-constable had not a right of private defence against the acts of such gipsies, as those acts did not reasonably cause the apprehension that death or grievous hurt would be their consequence, and such head-constable was guilty of culpable homicide amounting to murder.

THIS was an appeal by the Local Government from a judgment of acquittal of the Sessions Judge of Meerut, dated the 8th April 1880. The facts of the case are stated in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the Local Government.

Mr. *Amir-ud-din* for the accused person.

The High Court (PEARSON, J., and STRAIGHT, J) delivered the following judgment:—

STRAIGHT, J.—This is an appeal on behalf of Government from an order passed by the Sessions Judge of Meerut on the 8th April last acquitting the respondent, Abdul Hakim, of charges preferred against him under ss. 304 and 304A. of the Penal Code. The circumstances of the case, as detailed in the record, appear to be as follows:—On the night of the 28th January 1880, the house of one Harjas, Thakur of Karoli, was burglariously broken into by some person or persons, and certain property stolen therefrom. Information of the commission of this offence was in due course lodged at the Jewar thana by a chaukidar of the name of Mangala; and the respondent Abdul Hakim, chief constable of the station, was detailed for the duty of making inquiries into the matter. About mid-day on the 29th of January, accompanied by Gopal constable, Bura

and Mangala chaukidars, and Harjas, he left the Jewar thana, and proceeded to a place called Dianatpur, where there was an encampment of gipsies. Upon his arrival a search was made through the various tents for the stolen property or traces of it, but without success; and nothing was discovered in any way to connect the inhabitants of the camp with the crime of the previous night. It would seem that searches of a similar kind have been frequently made at the same place upon former occasions, and that a most reprehensible practice had sprung up for the police to accept presents in money from the gipsies, the amount of which varied more or less according to the rank of the officer conducting such search.

After the respondent and his party had concluded their examination of the tents, a sum of Rs. 2-4-0 was handed by one of the gipsies named Bandhu to the constable Gopal, who in his turn delivered it over to the respondent Abdul Hakim, who put it in his pocket, and then, saying it was not sufficient, demanded Rs. 5. This the gipsies refused to give, pleading poverty and their inability to pay such an amount; and thereupon the respondent ordered the constable Gopal, and the two chaukidars, Bura and Mangala, to bind Hardeva, one of the gipsies and brother of Bandhu, and to take him away in custody. This they were proceeding to do, whereupon all the men, women, and children in the camp turned out, some four or five of the men being armed with sticks, and advanced in a threatening manner towards the spot where Hardeva was being bound, and the respondent was standing. Before any blow, however, had been struck, or any actual violence received by him or his companions, the respondent raised a double-barrelled gun that he was carrying and aimed it at the people, or, as some of the witnesses say, directly at Bandhu, and fired it, the death of Bandhu being the instantaneous result. When he had done this, he immediately turned round and took to flight, but was pursued by some of the gipsies, and a constable who was present of the name of Kan Singh, and was captured by them and brought back to where the body of the deceased man was lying. Meanwhile information was conveyed by Gopal to the sub-inspector at the thana, named Abdul Kadir, and he ultimately went over to the camp at Dianatpur, and there after a long interval had elapsed, by a bribe of Rs. 125, induced the gipsies to burn the dead body of Bandhu, and surrender the gun by which

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his death had been caused. That portion of the case does not appear to have any very material bearing upon the guilt or innocence of the respondent Abdul Hakim. It has been made the subject of a charge against the sub-inspector Abdul Kadir, with this extraordinary result, that, while the Sessions Judge has held that, in point of law, no offence was committed by Abdul Hakim, yet nevertheless that Abdul Kadir, knowing and having reason to believe that an offence had been committed by Abdul Hakim, caused evidence of the commission of that offence to disappear, with the intention of screening him from legal punishment. It is obvious that such a position is wholly untenable, and the Full Bench ruling of this Court has already so decided.

We cannot but express our deep regret at, and disapproval of, the very inadequate and unsatisfactory manner in which the case was disposed of by the Sessions Court. We do not at all agree with the view of the Judge that the Magistrate's record was too voluminous. On the contrary, we think that he might well have imitated the care and diligence with which the inquiry was concluded in the first Court; and it is inexplicable why on the trial before him he omitted to take the evidence of two such important witnesses as Hardeva and Hatti, the two gipsies, called before the Magistrate. The notes recorded of what was said by the persons who were examined in the Sessions Court are sadly curt and incomplete; and the inference is irresistible that the Judge altogether misunderstood the true meaning of the principles of law upon which the right of self-defence is based, and too hastily adopted a conclusion that neither facts nor law, nor both combined, for an instant warranted. He seems entirely to have lost sight of the circumstance that the conduct of the gipsies, which is said to have justified the discharge of the gun, was provoked by the illegal act of the respondents in ordering the arrest of Hardeva for the purpose of getting his extortionate demand of Rs. 5 complied with. He had no right whatever to cause Hardeva to be taken into custody, for no stolen property had been found in the camp, nor was there any reasonable suspicion against him, nor had he obstructed the officers in making the search or in discharging their duty. Himself having provoked the action of the gipsies by his illegal and improper pro-

cedure, the respondent stands in no better and no worse position than any private person, and is not entitled to the superior protection which is thrown around a public servant lawfully acting in the discharge of his duty. It does not, however, appear to us that any question as to the right of self-defence strictly speaking arises, for upon the facts it is clear that any apprehension of death or grievous hurt which the respondent might have had could have at once been determined by the release of Hardeva, the abandonment of his demand for the Rs. 5, and the withdrawal of himself and his companions from the spot. In standing his ground for the moment and firing the gun off, he was in no way acting in the discharge of his duty as a police officer to protect his person or prevent the rescue of a prisoner, and as a private person there was ample opportunity for him to escape, and so remove all grounds of fear for life or limb. But even if we were for a moment to take into consideration the question as to whether he was or was not in apprehension of death or grievous hurt, it does not appear to us that, having regard to the fact that he himself was armed and his companions had batons in their hands, and that no violence had been used by the gipsies, there was reasonable cause for him to entertain any such apprehension. It is not sufficient, as was urged by counsel before us, for the respondent to say he was in fear of death or grievous hurt, which, by the way, he himself never has asserted; it is for the tribunal determining his guilt or innocence to find whether, having reference to all the circumstances in which he was placed, there were adequate grounds to justify him as a reasonable person in having such an apprehension. We entirely fail to follow the reasoning of the Sessions Judge that the not attempting to fire the second barrel is an indication of the absence of malice on the part of the respondent. It is pretty evident that, having seen the fatal consequences of his first shot, his immediate thought was to take to flight and save himself. Looking at all the facts, as disclosed in the records of the Magistrate and Sessions Court, we are of opinion that the acquittal of Abdul Hakim was a grave miscarriage of justice, and that this appeal by Government must prevail. The act of the respondent is entitled to no such justification, excuse, or protection, as can remove it from the category of culpable homicide amounting to murder. To fire a gun at the distance of five paces

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at a number of persons, holding it in such a way that one of them is mortally wounded in the heart, is to do a thing so imminently dangerous that the person doing it must have known that he would probably cause death, or such bodily injury as would be likely to cause death. According to the respondent's statement the shooting of Bandhu was accidental, and he had simply intended to fire off the gun over the heads of the gipsies for the purpose of frightening them, but his hand trembled, and the shots miscarried. This defence, however, is altogether disbelieved by the Sessions Judge, and so far, we may say, we entirely concur with him. In reference to this point, however, it may be observed that the ground upon which the Sessions Judge passed his order of acquittal was never taken by the accused himself, either in the Magistrate's Court or in the Court of Session.

The case is one of very grave public importance, and while we are fully sensible of the necessity for affording the fullest protection to police officers in the discharge of their duty, it is equally incumbent upon us to take care that the public are protected from extortion and violence at their hands. Money presents to the police of the kind mentioned in this case are only made under threats and compulsion and are grossly irregular and improper. Their unavoidable accompaniments are violence and coercion, and their inevitable consequences most injurious to the interests of justice. The conduct of the respondent Abdul Hakim was altogether gross and indefensible. We convict him of murder and direct that he be transported for the term of his natural life.

Appeal allowed.

Before Mr. Justice Pearson.

1880
 October 27.

EMPRESS OF INDIA v. JAGAN NATH.

Irregular Commitment—Place of inquiry and trial—Act X of 1872 (Criminal Procedure Code), ss. 33, 63.

S. 33 of Act X of 1872 contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 63 of that Act, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such commitment; and not of a case which has been inquired into in a district in which it was not committed, being committed to the

proper Court of Session as indicated by that section, by a particular Magistrate duly empowered by law to make such a commitment. Consequently, where a Magistrate inquires into and commits for trial an offence which has not been committed in his district, and the Court of Session for that district accepts such commitment because the prisoner has not been prejudiced thereby, and tries him for such offence, the proceedings in such cases are illegal *ab initio*.

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JAGAN NATH was committed for trial before the Sessions Judge of Banda by a Magistrate of the Hamirpur district, upon the charge of kidnapping a female minor, an offence punishable under s. 363 of the Indian Penal Code. The offence with which the accused person was charged took place and was completed, according to a statement by the Sessions Judge contained in his judgment, in the Fatehpur district. The Sessions Judge, Mr. G. E. Knox, made the following observations in his judgment, with reference to this fact:—"It is a pity that this case was ever committed to this Court; the real offence, the offence upon which the prisoner stands charged by the lower Court, took place and was completed in the Fatehpur district; the prisoner, however, is not prejudiced by the commitment; and I have therefore no choice but to accept the commitment: I would, however, draw the committing officer's attention to the extreme carelessness with which the charge sheet is drawn up, and request that further care be observed in future: kidnapping is not a continuing offence; it is complete as soon as the link between the person kidnapped and the possession of the lawful guardian is severed; in this case, that is said to have happened in the Fatehpur district, certainly not at Sisolar in this district."

The Sessions Judge having convicted Jagan Nath of the offence charged against him, he appealed to the High Court from such conviction.

Mr. Niblett for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

PEARSON, J.—The offence which is the subject of the present trial took place and was completed in the Fatehpur district. It should therefore have been inquired into by a Magistrate of that

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district and committed for trial to the Court of Sessions to which commitments from that district are made. The Sessions Judge of Banda, in accepting the commitment of the case made to him by a Magistrate of Hamirpur for the reason that the prisoner was not prejudiced thereby, has apparently relied on the provisions of s. 33 of the Procedure Code, which appear to me to be inapplicable under the circumstances. That section contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 63, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such a commitment. In the present instance none of the Hamirpur Magistrates had jurisdiction to inquire into the offence. The proceedings in the case were illegal *ab initio* and are accordingly quashed. The prisoner must be released and made over to the Fatehpur authorities to be dealt with by them according to law.

Conviction quashed.

1880
 June 17.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BANSIDHAR (DEFENDANT) v. BU ALI KHAN (PLAINTIFF).*

Promissory Note—Act XVIII of 1869, s. 3, (5), (25) and sch. ii, No. 11—Bond—Agreement—Interest—Penalty.

The defendant, having borrowed fifty rupees from the plaintiff, gave him on the 9th November 1878 an instrument which was in effect as follows:—"B (defendant) writes this "*rukka*" in favour of A (plaintiff) for Rs. 50, cash received, to be repaid on the 13th November, 1878: in the event of default, he shall pay interest at one rupee per diem." *Held* (STUART, C. J., dissenting) that such instrument was a "promissory note," within the meaning of the Stamp Act of 1869, and not a "bond" or "an agreement not otherwise provided for," within the meaning of that Act.

Held also that, looking to the whole instrument, it was equitable to hold that the term "interest" was not intended to mean interest in the strict sense of that term, but a penalty, and the amount of interest should be so treated, and a reasonable amount only be allowed. The observations of Pontifax, J., in *Bichook Nath Panday v. Ram Lochun Singh* (1) concurred in.

* Reference, under s. 617 of Act X of 1877, by R. G. Currie, Esq., Judge of Aligarh.

THIS was a reference to the High Court by Mr. R. G. Currie, District Judge of Aligarh, under s. 617 of Act X of 1877. The facts which gave rise to this reference were as follows:—The defendant, having borrowed Rs. 50 from the plaintiff, on the 9th November 1878, executed the following instrument in favour of the latter person :—"Bansidhar, son of Baldeo Das of Hathras, writes this '*rukka*' in favour of Bu Ali Khan for Rs. 50, cash received, to be repaid on (the 13th November 1878), without objection or excuse, in the event of default he shall pay interest at one rupee per diem without objection or excuse, and received back the '*rukka*' on discharge." The instrument was stamped with a one-anna receipt stamp. The plaintiff sued the defendant upon this instrument in the Court of the Munsif of Aligarh, describing it as a "promissory note" and claiming Rs. 300, that is to say, Rs. 50, the principal of the debt, and Rs. 250, interest at the rate of one rupee per diem from the date of default to the date of suit. The Munsif held that the instrument, so far as regards the principal of the debt, was a promissory note, and as such duly stamped with a one-anna receipt; but, so far as regards the interest claimed, that it was an agreement, and being as such insufficiently stamped was not admissible in evidence of the claim for interest. The Munsif accordingly gave the plaintiff a decree for Rs. 50, together with interest on that amount from the date of default to the date of suit at one per cent. per mensem, and dismissed the suit as regards the interest claimed. On appeal by the defendant the District Judge referred the following question to the High Court, under s. 617 of Act X of 1877 :—"The questions are under Act XVIII of 1869 which applies :—(i) Is this a promissory note, and properly stamped with a one-anna receipt stamp, or is it an agreement,—sch, ii, No. 11? (ii) Can it be divided and held to be a promissory note as regards the principal, and admissible in evidence for the principal, but inadmissible for the interest? (iii) If it is not a promissory note, but is inadequately stamped, can the Appellate Court accept payment of the deficiency, &c., under s. 20, Act XVIII of 1869? (iv) Supposing the document to be adequately stamped and admissible in evidence, is it obligatory on the Court to allow this

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exorbitant rate of interest, or is this a penal rate or penalty which should not be allowed? (v) Can the Appellate Court entertain the plea against the admission of this document by the Munsif as adequately stamped? The suit was instituted on the 25th July 1879, and the new Stamp Act (I of 1879) came into force on the 1st April 1879, and s. 20 is referred to." The reference was laid before Pearson, J., and Oldfield, J., who directed that it should be dealt with by the Full Bench. The reference was accordingly laid before the Full Bench.

Babu Oprokash Chandar Mukarji for the defendant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the plaintiff.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—The "*rukka*" or contract which forms the subject of this reference is in the following terms:—"Bansidhar, son of Baldeo Das of Hathras, writes this *rukka* to Bu Ali Khan for Rs. 50, cash received, to be repaid on Miti Magsar Badi 3rd (about four days after date) without objection or excuse: in event of non-payment according to promise, he will pay interest at one rupee per diem without objection or excuse, and receive back the '*rukka*' on discharge, dated Miti Kartik Sudi 15th, 1935, corresponding with 9th November 1878." And the first question is what is the legal character of such a document? Is it a "promissory note" within the strict meaning of that term, or is it an agreement or other obligation? Taken as a whole, I am clear that it is not a promissory note either within the meaning of that expression in s. 3, Act XVIII of 1869, or as it is known to European lawyers, for the condition as to interest deprives it of that character of certainty as to amount which is essential to the legal efficacy of a bill of exchange or promissory note; in other words, that the condition as to interest prevents us from regarding it as an engagement "*absolutely* to pay a *specific* sum of money," within the meaning of the definition of promissory note given in s. 3 of the Stamp Act of 1869. It appears to me that the document is of a two-fold character. It is a promissory note so far as the engagement to pay Rs. 50

four days after date is concerned, and as such may be detached from the undertaking to pay the interest at one rupee per diem. That undertaking I regard as in the nature of a collateral obligation. Such a collateral obligation might have been made in the form of a separate instrument, or it might be, as in the present case, incorporated with or added on the promissory note. In either case it is in its nature, in my opinion, quite distinct from the latter, and it is to be regarded and dealt with solely on its own legal merits as a mere penalty or otherwise. That such is the true view of this *rukka* appears to me to be clear from a strict view of its precise terms, according to which the promise to pay "the specified sum" ended with the first sentence. The document then goes on to provide that, "in event of non-payment according to promise, he (the promisor) will pay interest at one rupee per diem, and receive back the *rukka* on discharge," not, be it observed, this *rukka*, but "*the rukka*," showing, as I think may fairly be held, that a distinction was intended by the parties between the document so far as it was a promissory note for Rs. 50, and the engagement to pay extortionate interest of one rupee per diem, that is, at the rate of Rs. 730 per cent. per annum. The document therefore is not at all of the same nature occasionally and somewhat rarely found noticed in English law books, whereby the maker, in addition to the principal sum, engages to pay interest from the date of the bill or note, or, which is the same thing in legal effect, engages in the body of the instrument, and as part of the promise, to pay interest at a particular rate, in which case it has been held by the English Courts that such a contract is good, the interest being payable from the date of the note. In the present case, however, we have a very different document, for the undertaking to pay interest at one rupee per diem is not only not essential to the primary obligation to pay the Rs. 50 four days after date, but is a condition of a highly penal character, and legally objectionable therefore not only on that ground, but being a penalty and therefore reducible in equity, it must have the effect, if viewed as a necessary part of the whole *rukka*, of destroying its character as a promissory note, inasmuch as there cannot, under such circumstances, be shown to be on the

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face of the instrument a debt which is a *certain and specified sum*, the sum recoverable taken in connection with the interest as a penalty being essentially uncertain and incapable of being specified before decree.

That the interest stipulated for was a penalty, and one of a very outrageous kind, being at the rate of, as I have said, Rs. 780 per cent. per annum, cannot for a moment be doubted. A ruling by Mr. Justice Pontifex of the Calcutta High Court, in a case before him—*Bichook Nath Panday v. Ram Lochun Singh* (1)—was referred to at the hearing in support of this view, and I entirely concur in all that that learned Judge says on the subject, and I have had occasion frequently in this Court to refer to that excellent judgment as expressing a just and accurate view of the law. But we scarcely needed such an exposition in the present case, where the condition as to interest, by its very enormity, writes itself down not only as a penalty, but as a penalty of the most impudent and shameless character.

I have only to add that, as a penalty, the interest can only be recovered to an amount which will cover a reasonable rate, and also costs, and nothing more.

STRAIGHT, J. (PEARSON, J., and OLDFIELD, J., concurring).—This is a reference by the Officiating Judge of Aligarh under s. 617 of the Civil Procedure Code, which has been remitted to the Full Bench by Pearson and Oldfield, JJ.

With regard to the first question put to us, it appears to us that the real and substantive character of the instrument is that of a promissory note, or, in other words, that it is an absolute promise in writing to pay a specified sum on a given date. The stipulation as to interest does not, in our opinion, alter the direct object of the document, the undertaking to pay the principal amount on a particular day, which naturally falls within the definition of a specially designated form of contracts known as Promissory Notes and described in s. 3 of the Stamp Act of 1869; and we see no satisfactory reason for straining construction of its terms so as to throw it into the category of "Bond" or "Agreement not

otherwise provided for" by that statute. Every promissory note is an agreement, which in the present case is a promise to pay a certain sum on a certain date with interest from maturity at the rate of one rupee per diem. Had interest not been mentioned in the note it would have been recoverable, and it seems to us the mention of the amount of interest can scarcely be held to alter the whole character of the instrument. The answer to the first question of the Officiating Judge therefore should be that the document was adequately stamped, as a promissory note, and admissible in evidence for all purposes. Such being our view, it is unnecessary to reply to questions 2, 3, and 5. The fourth point involves many difficult considerations, and in expressing an opinion upon it, we do so with some doubt and hesitation. It is true that s. 2 of Act XXVIII of 1885 provides that, "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed on by the parties." But were the terms of that section strictly applied in every case, it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of "interest" might not be carried. In a country like this, where there is so much borrowing by the ignorant lower classes, who as much require to be protected against themselves as against the money-lenders, a too literal application of the above provision could only be productive of oppression and injustice of the most grievous kind. We entirely concur in the observations made by Pontifex, J., in a valuable judgment in *Bichook Nath Panday v. Ram Lochun Singh* (1), that the question as to whether "interest," as expressed in a document, is to be regarded as interest or a penalty should be decided according as the intention of the parties can be gathered from the document as a whole. In the present case, for example, for each day's default in payment of the principal sum, which by the way was only borrowed for four days, one rupee interest per diem was to be paid, or at the rate of Rs. 730 per cent. per annum. Now in one sense this may be said to be the "rate of interest agreed upon between the parties," if the word interest, being mentioned in the contract, is to be arbitrarily accepted in its strict sense. But we

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doubt if any Court of Equity would allow itself to be made the medium to enforce terms so monstrous. On the contrary it seems to us that, were the decision of the case referred before this Court, our plain duty would be to hold that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum; for it must be admitted that one rupee per diem for failure to repay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay.

Holding this view, and as an answer to the fourth question, we think that the amount of interest mentioned in the promissory note is in the nature of a penalty, and may be so treated by the Officiating Judge in disposing of the plaintiff's claim.

PRIVY COUNCIL.

P. C. *
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June 30 &
July 1.

KAMAR-UN-NISSA BIBI (PLAINTIFF) v. HUSSAINI BIBI

(DEFENDANT).

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Gift—Possession—Dower.

On an issue whether an oral gift of an estate, consisting of certain taluquas and mauzas, had been made by a Muhammadan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by Muhammadan law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

The possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration.

Held, on the evidence, that the gift was effectively made.

APPEAL from a decree of the High Court of the North-Western Provinces (2nd March 1877), reversing a decree of the Subordinate Judge of Jaunpur (25th February 1876).

The question on this appeal was whether or not an oral gift had been made by the appellant's uncle, Mehdi Ali, in favour of the

*Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR B. P. COLLIER.

respondent, Hussaini Bibi, his wife. The gift comprehended the whole of the revenue-paying lands of Mehdi Ali in Jaunpur and Azamgarh, and the principal questions which arose below were: Was Mehdi Ali of mental capacity to make a valid gift at the alleged date, viz., the 1st May 1870? If so, did he make it understanding what he was doing and intending to transfer his estate to the respondent? Was possession transferred by Mehdi Ali to the respondent? Was there any such consideration as was alleged, viz., the satisfaction of a due dower of Rs. 51,000.

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The Court of first instance held that Mehdi Ali, though of very weak intellect, was not proved to be incompetent at that time to make a valid disposition of his estate; and in this view the High Court on appeal substantially concurred. As to the second of the above questions, the opinion of the Subordinate Judge was one that involved his finding against the gift;—viz., that Mehdi Ali had no knowledge of it, and that all the circumstances, connected with the allegation of it, threw suspicion on its authenticity. As to the third question, the Subordinate Judge held that no transfer, or change of possession, in Mehdi Ali's lifetime, was proved. As to the fourth question, he held that no dower was shown to be then due.

The High Court, differing from the first Court on the second and third questions, was of opinion that Mehdi Ali made the oral gift, understanding what he was doing, and that he then transferred the possession to the respondent. As to the fourth question, relating to dower, the High Court held that they were not called upon to decide it, but that there was some confirmation of "the plaintiff's allegation as to Rs. 51,000 being the real amount."

On this appeal,

Mr. R. V. Doyne appeared for the appellant,

Mr. J. F. Leith, Q.C., and Mr. C. W. Arathoon for the respondent.

The facts are stated in their Lordships' judgment which was delivered by

SIR MONTAGUE SMITH.—The suit out of which this appeal arise was brought by Kamar-un-nissi Bibi, one of the heirs, and a

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niece of Mehdi Ali, who died on the 24th of April 1873, to recover a landed estate described in the plaint as the half of certain talooks and mauzas in the districts of Jaunpur and Azamgarh, against the widow of Mehdi Ali, who claims to hold the estate under a gift made to her by her husband in his lifetime. Mehdi Ali died childless. The state of the family, so far as it is material, is this: The father of Mehdi Ali was Shere Ali, who died on the 20th of December 1830, leaving two sons and a daughter, the sons being Ali Naqui and Mehdi Ali, and the daughter Amani Bibi. It appears that the daughter of Shere Ali, Amani Bibi, had three children—all daughters. Two of the daughters were living at the time of the commencement of the suit; the other was dead, leaving a son, Muhammad Hassan. The Court thought it right that those three persons should be made defendants in the suit, Kamar-un-nissa remaining the sole plaintiff. The addition of these defendants, however, did not change the main issue, which is, whether Mehdi, Ali made a gift of the estate in question, or of his share of those estates, to his wife. On the part of the plaintiff, the fact of the gift is denied. It was alleged to be made orally, and the plaintiff asserts that no such gift was ever made. But the plaintiff further contends that, if it were made, Mehdi Ali was in a state of mind in which he could not comprehend the full effect of the act he was doing, and that, in fact, he was imposed upon by his wife, and by her brother, Ghulam Abbas, who, it appears, had for some time managed the estate.

Before going to the evidence relating to the gift itself, it may be convenient to refer to what appears upon the record as to the state of Mehdi Ali's mind. Undoubtedly, it appears that at one time, if not a lunatic, he was treated by his family as being one, and that he was confined in a lunatic asylum at Benares, his mother, Chand Bibi, being appointed guardian. That state of things continued during the lifetime of Ali Naqui, his brother, who managed the whole estate until his death. Upon the death of Ali Naqui it appears that the Government took charge of the property. It does not appear that there was any regular attachment, but it was taken into the charge of an officer of the Government. Mehdi

Ali complained of his being kept out of possession of his share of the property. It may be as well here to state that Shere Ali had in his lifetime made a gift of his property to his two sons, Naqui and Mehdi, in equal shares. On finding the Government in charge, Mehdi Ali petitioned the Government, and prayed that he might be allowed to go and live upon his estate; and thereupon an investigation was made by Mr. Best, the Judge of the district. The following is his report of an interview he had with Mehdi Ali:—

“To-day Syud Mehdi Ali, and Jai Mangal Lal, his karinda, having appeared, caused their respective statements to be taken down. It does not appear *prima facie* from the manner of Syud Mehdi Ali's conversation that he is unable to do his work, though his intellect, owing to his retirement, may not be mature and keen, like the intellect of those who are continually engaged in transacting worldly business.” That being his finding, he comes to this conclusion: “As it is necessary to inquire under what law the Revenue Court has thus interfered, it is ordered that a copy of this proceeding be sent to the Officiating Collector, with a request that he will inform me of this after inquiring into the matter. After inspecting the house, he should make such arrangements for the residence of Mehdi that he may not be subjected to any inconvenience.” It appears that he was permitted to take possession of his property, and to reside in his own house. Mehdi Ali then applied for a mutation of names; to which the present appellant objected, stating that he was of unsound mind; but the Officiating Collector, and the Commissioner upon appeal to him, ordered the mutation as prayed. The present appellant then appealed to the Sudder Board of Revenue, who made this order: “The Board observe that the report of the Commissioner received lately shows that each party is at liberty to manage that portion of the estate of Syud Ali in respect of which his name has been entered in the proprietary column. Kamar-un-nissa has no right to manage the estate of Mehdi Ali, because, under Act XXXV of 1858, no application has been filed to prove that he was not qualified to manage his estate.” The appellant, upon that, took no further steps: but Muhammad, the great nephew of Mehdi, and grandson of his sister, took proceedings under Act XXXV, of 1858 to obtain a certificate of his lunacy. Without going into the evi-

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dence that was then given as to the state of his mind,—indeed, our attention has not been called to it by Mr. Doyne, who evidently felt that any Court which had now to decide upon the question of sanity would be very much guided by the reports then made,—their Lordships will proceed to consider what it was that was found upon these inquiries.

The first investigation was made by Mr. Currie. After going through the history of the case, he says :—"On the evidence before it, the Court cannot adjudge Syud Mehdi Ali to be a lunatic and incapable of managing his affairs; and this application is therefore rejected." Muhammad, not satisfied with Mr. Currie's decision, appealed to the High Court; and the High Court directed a further investigation, which was made by Mr. Edwards, the then Judge of the district. In his judgment, Mr. Edwards enters very fully into the evidence, describes an interview with Mehdi Ali, and gives the result on his own mind of the evidence, and of his interview with Mehdi Ali. The material part of his judgment is this:—"It is clear from the statements of the witnesses that they had free access to him, yet the only acts they speak of are very trivial, and would be taken as idiotcy rather than insanity; and that he is no idiot is fully proved by reports of both medical men who had full opportunity of judging. No one who saw Mehdi Ali could ever declare him to be an idiot. Agreeing in the suggestion in the proceeding of the High Court, I directed the attendance of the alleged lunatic at my house for a personal interview. The civil surgeon was present. I conversed with Mehdi Ali for a considerable time on various subjects, avoiding those on which he was likely to have been tutored. Neither in appearance, manner, nor conversation did he show any unsoundness of mind. He talked sensibly and to the purpose on any subject introduced, and replied to questions in a way which showed he fully understood them. His memory is evidently good, as he described matters which took place many years ago, such as Mr. William Frazer's murder at Delhi, as well as matters of later date. He is now an old man, of upwards of 60 years of age, I believe; and though he may have no pretensions to be an able or clever man, he is assuredly not a lunatic, nor is he in any way

to be termed incapable of managing his own affairs" That is a very strong opinion, not only that Mehdi Ali was at the time of sound mind, but that, though he was not of strong capacity, he was competent to manage his affairs and was fairly intelligent upon the subjects on which he had spoken. It is to be observed that their Lordships' attention has been called to no evidence which in any way contravenes this report. It may be that at an earlier period of his life he was a lunatic, but he had apparently recovered at the time of his brother's death, and in the early part of 1869 he appears to be a man, if not of strong mind, yet competent to deal with the ordinary affairs of life. The sub-registrar who took his acknowledgment of the mukhtar-nama, to be hereafter referred to, describes him as whimsical. It appears that he lived a secluded life; that he was a great student of the Koran; and that he did not attend to the practical management of his affairs, but left them very much to be conducted by his managers, the last of whom appears to have been Ghulam Abbas, his wife's brother. On the whole, their Lordships have come to the conclusion that he was perfectly able to comprehend such a transaction as a gift of his property to his wife.

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We now approach the transaction in question. It is said that on the 1st of May 1870, Mehdi, in the presence of seven witnesses, made, in the most formal way in which a verbal gift could be made, a gift of the property in question to his wife, who was present at the time. It is said that the words of gift were repeated three times—that is said by some of the witnesses, though not by all,—and the wife in a formal manner expressed her acceptance of the gift. The words said to have been used are formal, and probably were purposely formal. It is not alleged that, if what is said to have passed really took place, the gift was not a valid one, supposing that there was either consideration for it, or a transfer of possession. But the fact of the gift was decreed, and it was strongly contended that, if it had been intended by Mehdi Ali to give what is, no doubt, a considerable property to his wife, he would have taken the proper and ordinary precaution of having some document in writing as evidence of the gift, and that the fact that there was no such instrument was in itself a strong

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circumstance against the probability of the gift having been made. It was also said that no relatives were present, and that one of the neighbours in an independent position were called in to witness and sanction the transaction. However, there were seven persons present, including two mukhtars and some karindas. These persons were, no doubt, more or less dependent on the family, but no serious effort was made to impeach their evidence, except so far as the credibility of it is affected by their position. Their Lordships are quite prepared to agree with the Subordinate Judge that the Court is bound to watch with the greatest care, perhaps even with suspicion, the case of a verbal gift set up after the alleged donor's death; and if the case had rested upon the oral testimony alone, their lordships probably might not have had this appeal before them. It may have been that, in that case, the High Court would not have dissented from the view of the oral evidence which had been taken by the Subordinate Judge. But the case does not rest on this evidence alone, and it is not a case where an oral gift is set up, after a man's death which had not been heard of in his lifetime. An instrument was executed by Mehdi Ali, a mukhtar-nama, to carry the gift into effect; and publicity was given to the fact of the gift having been made, which drew forth, from the present appellant and others, opposition in the lifetime of the donor. The gift was made on the 1st May 1870, and about six weeks afterwards a mukhtar-nama was executed which contains a reference to the gift, and appoints a mukhtar to effect a mutation of names. The terms of the mukhtar-nama, and the way in which the gift is referred to, are worthy of great consideration. The gift is not cursorily mentioned, but is described so much in detail, that if the document was read to Mehdi Ali, and if he had intelligence enough to comprehend it, it is impossible that he should not have known that it was intended to carry into effect the gift which it alleged that he had made a short time before. The recital in the instrument is this:—"Whereas I have made a final verbal gift of all my estates mentioned above, which are my own property and possession, without the partnership of any other person, to Mussummat Hussaini Bibi *alias* Mehdi Bibi, my lawful wife, with all the rights appertaining thereto, and subject to all the liabilities for debts due to the creditors and chargeable on the

said property; and whereas I have caused the said donee to be put in proprietary possession of the whole of the said property as my representative, under the managership of Syud Ghulam Abbas, my manager and general attorney and brother of the said Mussummat; it is necessary that my (the executant's) name should be expunged from the Government papers, and that the said Mussummat be entered therein as proprietor and possessor of the said property. I, accordingly, for the purpose of filing petitions for the mutation of names in respect of the above-mentioned properties, hereby appoint Lala Jassoda Nand, a vakil of the Court and revenue agent, and Mir Sabit Ali, revenue agent, my mukhtars," in order to obtain the mutation of names. This document is proved in as satisfactory a manner as one can possibly expect. The writer of it is examined as a witness. One of the attorneys mentioned in it, who is also called, is a vakil of the Court, and is treated by the High Court as a respectable man. He proves that the mukhtar-nama was executed. The sub-registrar went to the house of Mehdi Ali, and obtained from him verification of the instrument. His evidence has also been given. The respondent did not rely upon the formal endorsement of registration on the document, but examined the sub-registrar, who proved the manner in which it was taken, and in his evidence states:—"The document was read to him by me; he heard it, and said 'Yes, I have executed it.' His conduct at that time did not show that he was not in his senses. I stayed only so long as was necessary for the purpose of registration. Mehdi Ali himself signed the registration endorsement; he did so after having read it." Unless it be held that the sub-registrar is not entitled to credit, or that Mehdi Ali was a man incompetent to understand what he heard and read, it is impossible not to perceive that this document confirms, in the strongest way, the evidence of the witnesses who say that the gift was made.

The gift is stated to have been made in consideration of a dower of Rs. 51,000, which remained unpaid. It is said that that dower is exorbitant, and there is positive evidence that the dower actually agreed upon at that time of the marriage was a much less sum; indeed, of a sum which appears to be almost

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nominal, little more than Rs. 100. In the first place, the Courts do not appear to have given credit to the witnesses who have stated that the dower was settled at that small sum; and if the persons who proved the gift are worthy of credit, they are entitled to receive credit as to what they prove to have passed with reference to the consideration, as well as with reference to the gift itself. Their Lordships cannot come to the conclusion that dower was not mentioned, or that the sum which the witnesses state was not that which was mentioned. It is unnecessary to affirm that that amount of dower had been agreed upon prior to the marriage. It may be that Mehdi Ali, though the dower might be only nominal at the time of his marriage, may have chosen to declare this large dower to be the consideration for the gift. He may have thought that it would give validity to the gift to declare that the dower was of that amount. It is not necessary by Muhammadan law that dower should be agreed upon before marriage: it may be fixed afterwards. Again, the sum itself, although a large one, is not excessive compared with the property of the donor. That some dower had been agreed upon is acknowledged; and the precise amount, as the High Court says, is not material to sustain the gift, because any amount would be a sufficient consideration for that purpose. No doubt, if their Lordships were satisfied that Mehdi Ali had not mentioned that sum of Rs. 51,000, it would go far to destroy the credit of the witnesses as to the rest of the transaction. They cannot, however, come to the conclusion that that sum was not mentioned by Mehdi Ali, whether it was the real amount of dower which had been previously agreed upon or not. But if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration.

It appears that the application for mutation of names was opposed by the present appellant, and that ultimately there was an appeal to the Board of Revenue. The appellant in that appeal was the present respondent, the revenue officers having decided against her. The opinion of the Board of Revenue is this:—The point to be decided is—Is appellant in possession or not? It appears to me that the proofs of her possession are many and strong

She has filed dakhilas for payment of Government money given in her name as far back as November 1870. She paid income tax in 1871 and 1872, for which she holds receipts. She sued a tenant for ejection in 1871, and obtained a decree. The Civil Court of Jaunpur, on the 19th February 1869, found that her husband was of sound mind," and so on. The Board allowed the appeal. Then the present respondent granted a zur-i-peshgi lease of part of the property to secure a sum of Rs. 2,000, which she did as owner, and being dealt with as owner. Their Lordships have come to the clear conclusion that there was a change of possession, which, even without consideration, would be sufficient to support the gift.

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Various proceedings afterwards took place upon the objection of the appellant. The officer, perhaps with reasonable suspicion, declined to effect the mutation of names unless Mehdi Ali came before them and authenticated the mukhtar-nama, and petitions presented in his name praying that the mutation might be made. While, undoubtedly, an inference might not unnaturally arise from his non-appearance, either that he did not choose to come forward to support the gift, or that those who had put forward a false gift prevented his appearing, there are circumstances which may explain his absence without making an inference so hostile to the case of the respondent. It is evident that Mehdi was an infirm man, and that he suffered from a painful complaint which made any exertion difficult to him; and, in addition to his physical ailment, he was a man of retired and secluded habits, who would be very reluctant to come before a Court and be examined. On the whole, therefore, their Lordships think that no inference sufficient to overturn the strong case which has been made on the part of the respondent in favour of the gift arises from Mehdi not having appeared before the officers when summoned on the application referred to. It is further to be observed that there is nothing improbable in the fact that Mehdi Ali should make a gift of his property to his wife in his lifetime. His father had made such a gift to his two sons, and Naqui, his brother, had given his property in his lifetime to his wife. Moreover, it was natural that Mehdi should prefer that his property should go to his wife rather than

1880 to the members of his own family who had taken or sanctioned the proceedings in lunacy against him.

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For these reasons, their Lordships think that the judgment of the High Court is right; and they will therefore humbly advise Her Majesty to affirm it, and with costs.

Solicitors for the appellant: Messrs. *W. and A. Ranken Ford.*

Solicitor for the respondent: Mr. *T. L. Wilson.*

CIVIL JURISDICTION.

1880
November 8.

Before Mr. Justice Pearson and Mr. Justice Straight.

GAURI SHANKAR (PLAINTIFF) v. SURJU (DEFENDANT).*

Registered Bond for the payment of money—Suit for compensation for the Breach of a Contract in writing registered—Act XV of 1877 (Limitation Act), sch. ii, Nos. 66, 116.

The defendant, having borrowed money from the plaintiff, gave him a bond dated the 4th July 1872, for the payment of such money, with interest, within two years, or on certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money; that it was payable on the 4th July 1874; that on that day he had demanded payment; that the cause of action arose on that day, as the defendant did not pay; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of No. 66 of sch. ii of Act XV of 1877, but one to which No. 116 of that schedule was applicable, and it might proceed on the plaint without any amendment thereof.

THIS was a reference to the High Court by Mr. R. D. Alexander, Judge of the Small Cause Court at Allahabad, under s. 617 of Act X of 1877. The facts which gave rise to this reference were as follows:—On the 4th July 1872, one Sarju executed a bond for Rs. 200 in favour of one Gauri Shankar and one Mata Prasad, the terms of which were to the following effect:—“I, Sarju, son of Gopal Pathak, by caste *prágwál*, resident of mohalla Daraganj at Allahabad, having borrowed and brought into use the sum of Rs. 200 of the current coin, half of which sum is Rs. 100,

*Reference, No 7 of 1880, by R. D. Alexander, Esq., Judge of the Small Cause Court, Allahabad.

bearing interest at two per cent. per mensem, to be repaid in two years, from Gauri Shankar and Mata Prasad, goldsmiths, residents of the said mohalla, hereby agree that I shall repay the principal amount and interest without objection to the above-named goldsmiths within the agreed time, and the interest on the above sum shall be paid in every year in the month of Magh: I shall cause the entries of the payments to be made on the back of this bond; should I produce any receipt, or acquittance, or the evidence of witnesses, it shall be considered false: if within the time aforesaid any one bring a suit or execute a decree against me, and bring my property to sale, or if the interest is not paid in the month above-mentioned, under any one or all of the above circumstances, the above-named goldsmiths are entitled, without the expiry of the period, to realize their money (principal and interest) from myself and my moveable and immoveable property by bringing a suit, and I shall raise no objection." This bond was duly registered. On the 30th June 1880 the obligees of this bond sued the obligor in the Court of Small Causes at Allahabad, the plaintiff in the suit stating as follows:—“(i) That on the 4th day of July 1872, the plaintiffs lent to the defendant, at Allahabad, the sum of Rs. 200 payable on the 4th July 1874; (ii) that the defendant has not paid the amount claimed, except Rs. 50 paid on account of interest on the 16th November 1874; (iii) that on the 4th July 1874, the plaintiffs, at Allahabad, demanded the payment of the amount now claimed, on which date the cause of action arose, since the defendant did not pay the amount; (iv) the plaintiffs pray judgment for Rs. 200 principal, and Rs. 189-12-0 interest from the 4th July 1872 up to the 4th July 1874 at two per cent., and from the 5th July 1874 up to the 30th June 1880, at one per cent.; total Rs. 389-12-0, after deducting Rs. 50 the amount received.”

The defendant confessed judgment on the 6th August 1880. The Judge of the Small Cause Court, *quo motu*, took up the question of limitation, and the nature of his proceedings will appear from the following extract from his order referring the case to the High Court:—“The suit has been brought as for money lent, Form No. 1, sch. iv, Act X of 1877. The plaintiff alleged that, under No. 116,

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sch. ii, Act XV of 1877 (Indian Limitation Act), the period of limitation for the above suit was six years, it being virtually a suit for compensation for the breach of a contract in writing registered, and not three years under No. 66 of the same, which applies to a suit on a simple bond where a day is specified for payment. He further asked for leave to amend the plaint as brought from a suit for money lent to one for compensation for breach of a contract in writing registered, and stated that, as there was no Form in sch. iv which would meet the latter kind of suit, he had felt bound to use Form No. I. Under Act IX of 1871 suits on a promise or contract in writing registered were under No. 117, sch. ii, given a limitation of six years, but under No. 116, sch. ii, Act XV of 1877, the suit must be for compensation for breach of a contract in writing registered, and the former wider provisions of the law would appear to me to have been restricted by the present Act. For suits on bonds of the kind in suit too a special provision of limitation has been made by No. 66, sch. ii. of the present Act; so though a bond is a contract which may be registered and of which there may be a breach, I feel doubtful if, when there is a special provision for limitation for bonds of this kind, a suit could be brought under No. 116 so as to defeat the special limitation of No. 66. Again, assuming that a suit can be brought so as to secure the extended limitation under No. 116, sch. ii, I feel doubtful whether, this suit having been brought in the form for money lent, I can allow the plaint to be amended, so that the suit may run for compensation for breach of contract, without acting contrary to the proviso of s. 53, Act X of 1877; for it would appear to me that, by doing so, I should allow a suit of one character to be converted into a suit of another, and, as it appears to me, inconsistent character. I therefore, under s. 617, Act X of 1877, refer the following points to the Hon'ble the High Court for decision :—(i) To a suit on a registered bond such as the one in suit, do the provisions of No 66 or 116, sch. ii, Act XV of 1877, apply, as to limitation? (ii) Assuming that the answer to the above be that No. 116, sch. ii, Act XV of 1877, will apply, if the suit is properly brought, has this Court power in the present case to allow the plaint to be amended so that that the suit may run as

one for compensation for breach of a contract in writing registered? I may add that, as to the first point, I feel, though with a good deal of doubt, of opinion that, when there is a special provision for limitation as in No. 66, it should bar the provisions of No. 116; and, as to the second, that, if the suit should have been originally brought for compensation for breach of contract, and not for money lent, that I have no power to allow the plaint to be amended now, owing to the proviso to s. 53, Act X of 1877."

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The parties did not appear.

The High Court (PEARSON, J., and STRAIGHT, J.) made the following order:—

PEARSON, J.—It appears to us that this is not a suit which falls within the scope of art. 66, sch. ii of the Limitation Act XV of 1877. No day is specified in the bond for payment of the money lent. Under the terms of the bond the loan might have been repaid on any day before the expiry of two years, and might have been claimed before them on certain contingencies contemplated and defined. The plaint makes no mention of the bond, but alleges with sufficient distinctness a failure of payment within the stipulated period, or, in other words, a breach of contract, and claims the amount remaining due under the bond, which is virtually the measure of the compensation due for the alleged breach of contract. This being so, we are of opinion that the article 116, sch. ii of the Limitation Act, is applicable to the suit which may proceed upon the plaint without any amendment thereof. The Small Cause Court Judge may be advised accordingly.

FULL BENCH.

1880

November 11.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,
Mr. Justice Cliffield, and Mr. Justice Straight.*

EMPRESS OF INDIA v. ABDUL KADIR.

Causing disappearance of evidence of an offence—Act XLV of 1860 (Penal Code), s. 120.

Held that it is necessary, in order to justify a conviction under s. 201 of the Indian Penal Code, that an offence for which some person has been convicted or is criminally responsible should have been committed.

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ONE Abdul Hakim, who had caused the death of one Bandhu, was placed on his trial before the Sessions Judge of Meerut on a charge of culpable homicide not amounting to murder, an offence punishable under s. 304 of the Indian Penal Code. On the 8th April 1880, the Sessions Judge acquitted him of that offence. Subsequently Abdul Kadir, who, in order to screen Abdul Hakim from the consequences of causing Bandhu's death, had caused Bandhu's dead body to be burnt, was tried before the Sessions Judge for causing evidence of the commission of an offence to disappear, an offence punishable under s. 201 of the Indian Penal Code; and, on the 28th April 1880, was convicted of that offence by the Sessions Judge. He appealed from such conviction to the High Court on the ground, among others, that, as it had not been proved that an offence had been committed, he could not legally be convicted of concealing an offence. The appeal came for hearing before Straight, J., who referred the following question to the Full Bench:—

“Is it necessary, in order to justify a conviction under s. 201 of the Penal Code, that an offence for which some person has been convicted or is criminally responsible, within the definition of s. 40, should have been committed”?

Mr. Ross and Shah Asad Ali for Abdul Kadir.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—My answer to this reference is in the affirmative. If I were trying a case under s. 201, Indian Penal Code, and it was proved in the course of the trial that no offence had been committed, I should consider it my duty to direct the jury to return a verdict of acquittal. Under the Penal Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception may appear to be. The whole difficulty respecting the meaning of s. 201 arises from the somewhat awkward manner in which the words “knowing or having reason to believe that an offence has been committed” are used

or collected, which at first sight may appear to favour the idea that the mere having reason to believe was sufficient to support a conviction. According to all recognized principles of criminal jurisprudence, however, an offence must first have overtly or actually been committed, and thus the meaning of the section, and, in this sense, the opening words of s. 201, would have been more clearly expressed as follows:—"Whoever, knowing that an offence has been committed, or having reason to believe that an offence has been committed, the said offence having been actually committed." This I hold to be the legal construction to be put on s. 201.

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PEARSON, J.—My answer to the question is in the affirmative. In my opinion the terms used in the section "knowing or having reason to believe" conclusively negative and preclude the view that its provisions are applicable in cases in which an offence has not been committed. For it is impossible for anyone to know or to have reason, or sufficient cause, to believe that an offence has been committed when it has not been committed. A person may fancy that he knows or has reason to believe an offence to have been committed when it has not been committed, but he is mistaken in so fancying. He may, under the influence of such a mistake, remove something which he imagines to be evidence of the offence which he supposes to have been committed, and he may be morally blameable for so doing. But it is beyond the province of criminal legislation to punish a man for a delusion, or even for an act which has not caused any actual harm to the public or any individual member of society. I am also of opinion that the words "that offence," relating back as they do to the previous words "an offence," cannot be construed to mean any other than a real offence, and similarly that the words "the offender" mean the real, and not an imaginary, offender.

OLDFIELD, J.—For a conviction under s. 201 it is necessary that an offence for which some person has been convicted or is criminally responsible shall have been committed. The language of the section precludes any other view:—"Causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment." There can be no offender liable to legal punishment unless some offence has been

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committed, and the thing which a person causes to disappear cannot be said to be evidence of an offence unless an offence has been committed. I presume the object of the law was to ensure the conviction of offenders for offences committed,—not to punish persons, who, acting on an erroneous impression that some one had committed an offence, cause the disappearance of what they believe might be used as evidence. I can conceive no reason in the interests of justice or public police why such an act should be made penal.

STRAIGHT, J.—In answer to this reference, I would say that it is necessary, in order to justify a conviction under s. 201 of the Penal Code, that an offence for which some person has been convicted or is criminally responsible should have been committed. I have given the fullest weight in considering the matter to the argument of public expediency urged against this view; but, in construing a penal statute, I cannot apply that elasticity of interpretation contended for by the Junior Government Pleader. To do so I must read the section as if it enacted as follows:—"Whoever, having reason to believe that an offence has been committed, causes what he supposes to be evidence of the commission of the offence which he believes to have been committed to disappear, with intent to screen the person he believes to be the offender from legal punishment, &c." Now I do not feel myself warranted in introducing all this matter into the section, when, if the Legislature had contemplated the creation of any such offence, language might readily have been found to express such intention. I must take the words as I find them, and not strain them for the purpose of meeting remote contingencies that might arise. If an offence has been committed, and the evidence shows that, as a reasonable man, the accused had sufficient reason to believe that it had been committed, and under that belief caused evidence to disappear, with intent to screen the offender, then, in my judgment, he is criminally responsible, but not otherwise. This seems to have been the view of the learned Judges who decided the cases of *Queen v. Ram Ruchea Singh* (1) and *Queen v. Subbramanya Pillai* (2); and I see no reason to dissent from the opinions they express. The answer to this reference must therefore be as I have already indicated.

(1) 1 Wym. (Criminal Rulings), 1.

(2) 3 Mad. H. C. R., 251.

CRIMINAL JURISDICTION.

1880
November 11.*Before Mr. Justice Straight.*IN THE MATTER OF THE PETITION OF RAUNAK HUSAIN *v.* HARBANS SINGH.*Construction of Act with reference to Bill—Compoundable Offence—Cheating—Forgery—Act X of 1872 (Criminal Procedure Code), s. 188—Act XLV of 1860 (Penal Code), s. 214.*

Cheating and forgery are not offences which may be lawfully compounded. Where a Magistrate decided that certain offences could be lawfully compounded, having regard to a bill which the Legislature had brought in amending s. 214 of Act XLV of 1860, *held* that it was irregular for such Magistrate to allow his decision to be guided by any thing in a bill that had not become law, and it was his duty to have interpreted that section without reference to merely contemplated legislation.

THE Agent of the Bank of Bengal at Agra made a complaint against one Harbans Singh and one Durga Prasad of obtaining the loan of certain moneys from him by cheating, cheating by personation, and forgery, offences severally punishable under ss. 417, 419, and 465 of the Indian Penal Code. The Magistrate before whom such complaint was made, Mr. R. S. Aikman, having examined the complainant, issued a warrant for the arrest of the accused persons. Subsequently, and before any further proceedings had been taken, the Agent of the Bank presented an application to the Magistrate, in which he stated "that he did not wish to press the charges he had made against the accused persons, who had paid all the money due to the Bank, and he accordingly left the matter entirely in the hands of the Court." The Magistrate, treating this application as one to withdraw the charges against the accused persons, made the following order thereon on the 5th November 1879:—"It is with considerable hesitation that I accede to this application, and I grant it only on the following grounds:—S. 188 of the Criminal Procedure Code lays down that an offence for which a prosecution has been instituted may, with the permission of the Court, be compounded if the offence is one which may lawfully be compounded. The law on this point, *i.e.*, as to what offences are compoundable, is contained in the *Exception* to s. 214, Indian Penal Code. But the interpretation of that *Exception* and of the *Illustrations* attached to it has given rise to so much difficulty, that

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the Courts have expressed a wish that the question should be cleared up by the Legislature. Apparently in deference to this wish, the Legislature has brought in a bill which clearly defines what offences may and what offences may not be compounded. Among the former are offences such as the present (cheating by personation). Although the bill has not become law, yet I take it as indicating the mind of the Legislature on an obscure point, and accordingly permit the charge to be withdrawn."

One Raunak Husain, a stranger to the proceedings, thereupon presented an application to the High Court, praying that it would exercise its powers of revision under s. 297 of Act X of 1872, on the ground that the order of the Magistrate was contrary to law.

Mr. *Leach* for the petitioner.

The Court made the following order:—

STRAIGHT, J.—This is an application by one Raunak Husain, of Shikohabad, zila Mainpuri, under s. 297 of the Criminal Procedure Code, for revision of an order passed by the Magistrate of Agra on the 5th November 1879. It has this peculiarity about it, that the applicant was in no way interested in the case in which the decision was given which he now brings under notice, and admittedly, through his pleader, presents himself to the Court in the character of an informer from motives of personal ill-feeling against the two persons most concerned. I hesitated at the time the application was made to me to send for the record at the instance of a party whom it was impossible not to regard with some amount of suspicion and disfavour; but upon mature consideration, having regard to the extreme importance of the allegations made in the petition and the desirability of clearing the matter up, I acceded to its prayer. From the record it appears that some time in October 1879, a complaint was preferred in the Court of the Magistrate of Agra by Mr. Fishbourne, the local Agent of the Bank of Bengal, against two persons named Kuar Harbans Singh and Durga Prasad, charging offences against them under ss. 417, 419, 465, and 468 of the Penal Code. The substantial allegation was that on twelve different occasions the accused Harbans Singh

falsely represented to Mr. Fishbourne that the accused Maharaj Durga Prasad was one Chaudhri Durga Prasad, a man of wealth and extensive property in Etáwah, the accused Maharaj Durga Prasad aiding and abetting him in so doing, and personating the said Chaudhri Durga Prasad; and that by this false representation they induced the said Mr. Fishbourne to advance a loan of Rs. 29,500 to Harbans Singh on the security of the other accused. When the time arrived for the repayment of the loan, it was then discovered by the Manager of the Bank that Chaudhri Durga Prasad had no knowledge of the transaction, and that the loan had been obtained from him by cheating and fraudulent personation. Subsequent to this, he received Rs. 18,000 in part payment, and at the time of the institution of criminal proceedings Rs. 2,500 remained due. Upon these facts the Magistrate granted his warrant for the arrest of the two accused persons, who then, under the pressure of prosecution, seem to have paid up the balance due to the Bank. Upon the 4th of November counsel for the complainant put in a petition, stating that, all the money due having been paid, the Bank did not wish to press the charge, and application was made asking permission to withdraw it. To this course the Magistrate by his order of the 5th November assented. I am clearly of opinion that this order was illegal and improper, and that it was not competent for the Magistrate to permit the offences disclosed by the facts set out in the information to be compounded. It was irregular for him to allow his decision to be guided by anything that appeared in some proposed bill that had not become law, and it was his duty to interpret the *Exception* to s. 214 of the Penal Code without reference to merely contemplated legislation. The very essence of the crime charged against the accused was the intent to cheat and defraud, and the Magistrate having, by granting his warrant, shown that he considered there was sufficient *prima facie* evidence of this intent, he should have investigated the case to the end and either have acquitted or convicted. The circumstance that the Bank had so long delayed to prosecute after ascertaining that fraud had been practised, and that the Rs. 18,000 had been received subsequent to its discovery, might reasonably have made him hesitate as to the policy of issuing criminal processes at all; but when he

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had once allowed the criminal law to be set in motion, he should have required the complainant to carry his prosecution through to the end, and should either have convicted or acquitted the accused persons. A very grave charge had been made against them, which required the most serious investigation, and though the Bank authorities acted with perfect candour and straightforwardness in stating the circumstances that led them to desire to withdraw from the prosecution, he could not properly entertain their application. Nothing could be more mischievous than to allow the process of the Criminal Courts to be used for the purpose of enforcing civil claims, and Magistrates cannot too jealously guard the important and extensive powers they possess from being abused for such a purpose.

The proposed Criminal Procedure Code has not yet become law, and it may be matter for very serious doubt whether it is expedient or desirable to sanction the compounding of such an offence as cheating by personation. I regret that so long a time has elapsed since the Magistrate passed his order allowing the withdrawal, but even thus late in the day I cannot avoid quashing it. The prosecution must be revived and full inquiry made into all the circumstances, and when this has been done the Magistrate will pass such order as appears to him to be proper.

Application allowed.

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November 16.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

SADIK ALI KHAN (PLAINTIFF) v. IMDAD ALI KHAN AND OTHERS
 (DEFENDANTS).*

Filing agreement to refer to arbitration in Court—Reference to arbitration—"Decree"—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 520, 522, 523, 524.

The sharers of a joint undivided estate agreed in writing that such estate should be partitioned and the accounts thereof settled by arbitration, and named one of such sharers as arbitrator, and agreed that he should settle all the accounts, show the surplus at each sharer's credit, and prepare lots, after partition of the lands and houses comprehended in such estate, and have

* First Appeal, No. 128 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 9th June 1879.

them drawn within one year from the completion of the partition. Subsequently one of such sharers applied, under s. 523 of Act X of 1877, to have such agreement filed in Court. The other sharers, not objecting to this course, such agreement was filed accordingly, and the case was referred to such arbitrator. The arbitrator made an award whereby he partitioned such estate into lots, assigning some only of such lots by name, and wherein he stated that he had not been able to settle the accounts owing to the default of the parties, and that, considering that the partition should take effect without any delay, he did not ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement," and he requested that the unassigned lots might be drawn in Court. The Court made an order confirming the award, and, it being objected that the settlement of the accounts should not be postponed, but that they should be settled as agreed, directed that the arbitrator should settle the accounts, and gave him a year's time for that purpose, and, some of the parties not being willing to draw the unassigned lots, directed the distribution of such lots "in reference to the age and number" of the sharers.

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Held that such order was a "decree" within the meaning of ss. 2 and 522 of Act X of 1877: that the arbitrator should himself have drawn such lots, or he should have made the parties draw them; but, inasmuch as it would not have strained the agreement to have had such lots drawn in Court, and no objection had been taken to the arbitrator not having himself drawn them, it was not incumbent on the Court to have remitted the award in order that the arbitrator might have drawn them: that the Court, however, should not have distributed such lots in the manner it had done, but should have drawn a lot for each person, and in acting as it had done it had acted contrary to the award, and for that reason its decree could not be maintained: and that, in confirming the award before the accounts had been settled and an award made in respect thereof, the Court had acted erroneously, inasmuch as the award had left undetermined a very important matter, viz., the settlement of the accounts, and the Court should, under s. 520 of Act X of 1877, have remitted the award for the reconsideration of the arbitrator, and, as it had the power to remit it upon such terms as it thought fit, the Court could have allowed one year, if necessary, for the settlement of the accounts; and on this account, and also because the Court had made an order postponing the settlement of the accounts, and thereby made an order contrary to and in excess of the award, its decree must be reversed.

ONE Saadat Ali Khan died on the 4th September 1865, leaving as his heirs six sons and two widows. On the 13th June 1877, these persons agreed in writing that Imdad Ali Khan, one of such sons, should, as arbitrator, adjust the accounts of the undivided portion of Saadat Ali Khan's estate, and partition such portion, which consisted of lands paying revenue to Government, houses, and gardens. Under the terms of this agreement the arbitrator was to adjust such accounts, and prepare lots and cause them to be

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drawn within one year after he had made the partition. On the 11th July 1878, Sadik Ali Khan, one of the heirs, applied, under s. 523 of Act X of 1877, to have this agreement filed in Court. The other heirs did not object to this course, and the agreement was filed accordingly, and an order was made referring the case to the arbitrator. The arbitrator made an award dated the 30th April 1879, the period for the completion of the award specified in the order of reference having been enlarged from time to time at the request of the arbitrator. The arbitrator stated in the award that he had not been able to adjust the accounts of the property owing to the failure of the parties to submit their accounts, and that, considering that the property should be partitioned, he had thought it advisable not to ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement." He partitioned the property into eight lots, assigning, as regards the lands paying revenue to Government, lots to Asghar Ali, one of the sons, and to the two widows, severally, by name, on the ground that Asghar Ali had transferred his share in some of the villages to his wife, and his share and that of one of the widows in other villages had been sold, and the lot of the junior widow was not equal to the lot of the senior one. The arbitrator also requested that the unassigned lots might be drawn in Court. Some of the parties objecting that the adjustment of the accounts of the property should not be made the matter of a fresh agreement, as suggested by the arbitrator, but that the accounts should be adjusted at once, in accordance with the existing agreement, the Court decided that the arbitrator should adjust the accounts, but that, having regard to the fact that the accounts relating to some eighty villages for fourteen years had to be prepared, he should be allowed one year for the adjustment. As some of the parties were not willing to draw the lots, the Court held that it was left to it to assign the lots, and it accordingly made the following order regarding the lots:—"It is therefore ordered that the arbitrator's award, dated 30th April 1879, be confirmed: that it be acted upon: that, as regards the lots framed by the arbitrator with specification of names, they be taken by the particular persons specified: that the remaining lots be assigned with reference to age and number: and that equal costs, without interest, be paid

by all the co-sharers: the specification of the lots, the names of the sharers, and the detail of the property be carefully set forth in the decree: the Court further directs that, as regards the second point mentioned in the agreement for reference to arbitration, the arbitrator be allowed one year's time to settle the accounts completely and to file his decision in respect thereof in Court: if any party has at that time any objection, the Court will decide such objection in due course."

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The plaintiff appealed to the High Court, contending that the decree of the Subordinate Judge was not in accordance with the award, as the arbitrator had directed that the lots should be drawn, and that the order allowing one year's time for the adjustment of the accounts was illegal.

Pandit Nand Lal for the appellant.

Pandit Bishambhar Nath and *Mir Zahur Husain* for the respondents.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

SPANKIE, J.—An application under s. 523 of Act X of 1877 was made that an agreement to refer the matters in dispute between the parties to arbitration might be filed in Court. This was done and by consent of all parties the dispute was referred to an arbitrator, who himself was one of the sons of the deceased gentleman whose estate formed the subject of reference. The arbitrator was to partition the estate under conditions set forth in the agreement, and to take an account of mesne profits. He was to settle all accounts, show the surplus at each sharer's credit, and to prepare lots after division of the houses and lands and to have them drawn within one year from the completion of the partition. The parties also bound themselves to assist in the preparation of the accounts from 1273 faali up to the time of partition. The estate was a large one and considerable delay occurred in submitting the award. The award when submitted did not settle the accounts, but the arbitrator sent in the partition papers and the lots. The arbitrator records in the award that "all parties stated that they would adjust the

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accounts after renewing the deed of agreement." These words mean that a new agreement was to be made in regard to the adjustment of the accounts. The award further states that the papers of partition in detail are forwarded with an application that the Court would draw the lots. Objections were taken that adjustment of the accounts should not have been postponed, but they should have been settled in accordance with the terms of the agreement. The Subordinate Judge appears to have considered this objection reasonable, and that he ought to decide that the arbitrator should "settle the account also." He allowed the arbitrator one year for the purpose of completing the account. But the lower Court states that it would be prejudicial to all the sharers if the confirmation of the division of property should be delayed until the accounts had been settled. He therefore considers that each sharer should be put in possession of his separate share. The arbitrator had prepared some of the lots, specifying the name of the parties to whom the several lots belonged. But there were other lots without specification. But when the parties were asked to draw these lots, some of them were unwilling to do so. The lower Court therefore undertook to distribute the lots amongst the several sharers. The Subordinate Judge records that he "assigned them with reference to age and number." He then confirms the award as regards the partition and directs that it be acted upon, and allows the arbitrator one year's time to settle the accounts and to file his award in Court, when this part of the case would be disposed of. It is objected that the decree is not in accordance with the award. The lots should not have been distributed between the sharers according to number and age, but the sharers should have drawn lots. It is also urged that the Court acted illegally in giving one year's time to the arbitrator to settle the accounts. A preliminary objection was taken by respondent that there was no appeal, as there was no decree within the definition of that word in the Civil Procedure Code. We, however, do not see the force of this objection. When an application has been admitted, it is numbered and registered as a suit between the parties interested. The appellant was the plaintiff, the other sharers were the defendants. By s. 524 of the Code the foregoing provisions of chapter XXXVII, so far as they are consistent with any agreement filed under s. 523, are made

applicable to all proceedings under the order of reference, and "to the award of arbitration, and the enforcement of the decree founded thereupon." Thus the provisions of s. 522 of the chapter would be applicable, for they are in no way inconsistent with the agreement, but are altogether consistent with it. Under s. 522 the Court, when all objections to its doing so have been removed, shall proceed "to give judgment according to the award," and upon the judgment so given "a decree shall follow, and shall be enforced in the manner provided in this Code for the execution of decrees." Here the decree was the formal expression of the adjudication upon the rights of the parties, and the adjudication decided the suit. Therefore the definition of "decree" in s. 2 of the Code includes the order made in this case. Moreover, under the terms of s. 522, though ordinarily a decree confirming an award is final, still an appeal is allowed when the decree is in excess of or not in accordance with the award. These remarks dispose of the preliminary objection.

On the appeal we think that the lower Court, if the Subordinate Judge believed that he was at liberty to act, and the parties were unwilling to draw lots for themselves, should have drawn a lot for each person, and should not have assigned the several parcels with reference to the number and age of the several parties. But we observe that the arbitrator himself ought to have drawn the lots where he had not already specified their owner by name, or he should have made the parties draw them. He was authorized by the agreement "to prepare the lots and have them drawn within one year after dividing the houses and villages." It may, however, be said that it would not be straining the agreement, if the arbitrator preferred to have the lots drawn in the court, and it does not appear that any objection was taken to his not having himself drawn them. We do not therefore consider that it was necessary to remit the award to the arbitrator to draw the lots. But we think that the lower Court acted contrary to the award in distributing the lots in the way adopted by it, and on this account the decree cannot be maintained. We also observe that the lower Court acted erroneously in confirming the award before the accounts had been prepared and an award given in respect of them. The award had left undetermined a very important matter referred to arbitra-

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tion, namely, the settlement of the accounts, and under s. 520 the Court should have remitted the award for the reconsideration of the arbitrator, and, as he had the power to remit it upon such terms as he thought fit, the Subordinate Judge could have allowed one year, if necessary, for the settlement of the accounts. The Subordinate Judge should not have determined the suit upon an incomplete award, and we are compelled to reverse his decree on this account, and also because he has made an order postponing the adjustment of the accounts and thereby made an order contrary to and in excess of the award. For the award, if a good one, does not undertake to settle the accounts, but states generally and vaguely that a new agreement would be made hereafter respecting them. As it becomes necessary to reverse the decree, it would be proper that the case should go back to the lower Court, and the Subordinate Judge will have the opportunity of remitting the award for the adjustment of the accounts, and he can also instruct the arbitrator to carry out the terms of the agreement and to have the lots drawn, either by the parties or for them. When the arbitrator has carried out his instructions, he will again submit his award, and upon it the Subordinate Judge can proceed according to law. We decree the appeal and reverse the decree of the lower Court with costs, remanding the case in order that it may be dealt with in accordance with the instructions contained above.

Cause remanded.

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 November 25.

Before Mr. Justice Pearson and Mr. Justice Spinkie.

RAI CHAND (PLAINTIFF) v. MATHURA PRASAD AND OTHERS
 (DEFENDANTS).*

Adjournment—Non-appearance of plaintiff—Act X of 1877 (Civil Procedure Code), ss. 102, 103, 640—Appeal.

Nothing remained to be done in a suit except to hear arguments, for which a time had been appointed. Neither the plaintiff nor his pleader appeared at the appointed time. The Court consequently dismissed the suit. *Held* that its decree was appealable under s. 640 of Act X of 1877, and the lower appellate Court

* Second Appeal, No. 641 of 1880, from a decree of C. J. Daniell, Esq., Judge of Mirzapur, dated the 25th March 1880, affirming a decree of Muhammad Wajih-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 22nd September 1879.

should have entertained the appeal and disposed of it with reference to the provisions of s. 565, and ss. 102 and 143 were not applicable to the circumstances.

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It appeared from the decision of the Court of first instance in this suit that, on the 22nd September 1879, at the hearing of the suit, after witnesses had been examined, and before the pleaders for the parties had addressed the Court, the pleaders for the parties requested permission from the Court of first instance to attend another Court. Such permission was granted to them on the understanding that they would return and argue the case when they had finished their business in the other Court. The pleaders for the defendants made their appearance on that day before the hour at which the Court of first instance usually rose, but neither the plaintiff, nor any of his pleaders, notwithstanding the services of such pleaders were no longer required in the other Court, appeared. Under these circumstances, and having regard to the fact that the plaintiff, although he had been summoned to produce certain documents, had neither produced them nor assigned any reason for not producing them, the Court of first instance ordered "that the plaintiff's claim be dismissed with costs." The plaintiff appealed, impugning the statement of the Court of first instance that his pleaders had neglected to attend, and contending that, even if this were so, that Court should not have dismissed the suit, but should have decided it on the merits. The lower appellate Court held that the appeal did not lie, inasmuch as the suit had been dismissed under the provisions of s. 157 and chapter VII of Act X of 1877, and the plaintiff should have applied under s. 103 for an order to set aside the dismissal of his suit, and if he was not satisfied with the order made on such application, have appealed therefrom under s. 588 (8). The plaintiff appealed to the High Court, contending that the Court of first instance had made a decree dismissing the suit, and such decree was appealable; and that s. 157 of Act X of 1877 did not apply, the suit not having been dismissed thereunder.

Mr. C. Dillon and Lala Lalta Prasad for the appellant.

The Senior Government Pleader (Lala Juala Prasad), Munshi Hanuman Prasad, and Lala Jokhu Lal for the respondent.

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The judgment of the Court (PEARSON, J., and SPANKIE, J.) was delivered by

PEARSON, J.—It appears to us that the Subordinate Judge's decree dismissing the plaintiff's suit was appealable to the Zila Judge under s. 540 of the Procedure Code, and that the Zila Judge should have entertained it and disposed of it with reference to the provisions of s. 565 of the Code. Both parties had appeared in the Court of first instance, and their witnesses had been examined in their presence. Nothing remained to be done except to hear arguments. If the plaintiff or his pleaders did not return after having been allowed to leave the Court at the hour appointed for the argument, the Subordinate Judge (if he did not think fit to adjourn the case to another day) might have proceeded to decide the case on the merits. Ss. 102 and 103 of the Code seem to be inapplicable to the circumstances. We remand the case to the lower appellate Court that it may dispose of the appeal according to law. The costs of this appeal will abide and follow the event.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

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November 25.

NANHAK JOTI AND ANOTHER (DEFENDANTS) v. JAIMANGAL
CHAUBEY AND OTHERS (PLAINTIFFS).*

*Joint Hindu Family—Joint family property—Joint Family debt—
Execution of decree against Father—Rights of Sons.*

R, a Hindu father, gave certain persons a bond in which he hypothecated the joint undivided property of his family. Such persons obtained a decree against *R* on such bond, in the execution of which "such rights and interests only as *R* had, as a Hindu father, in a joint undivided family" were put up for sale. *Held* that, although *R* might have, as a Hindu father, a power of dealing with the interests of his sons, that circumstance would not make such interests his own, so as to pass them by a sale which affected his own interests only, and the auction-purchasers could be held only to have purchased his interests.

THIS was a suit for possession of a 4-anna share of a certain mahál. Raj Kumar had executed a bond for Rs. 500 on the 26th October 1872, in which, describing himself as the proprietor of such 4-anna share, he hypothecated it as collateral security for the payment of such money. On the 19th February 1878, the obligees of such bond sued Raj Kumar thereon, and obtained a

* Second Appeal, No. 576 of 1880, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 3rd June 1880, reversing a decree of Babu Ramkali Chaudhri, Subordinate Judge of Benares, dated the 2nd April 1880

decree against him enforcing the hypothecation of such share. The share having been attached and proclaimed for sale in the execution of that decree, the minor sons of Raj Kumar, on the 3rd December 1878, objected to the sale on the ground that the share did not belong to their father, but was joint ancestral property. On the 19th December 1878, the Court made an order declaring that the intended sale should be confined to "such rights and interests of Raj Kumar in the share as a Hindu father has in a joint family." The share was put up for sale on the 20th December 1878, and was purchased by the obligees. The sale-certificate granted to the purchasers declared that they had purchased only "such rights and interests in the share as Raj Kumar, according to Hindu law, had in joint ancestral property." The auction-purchasers, on the 3rd June 1879, took possession of the share; and on the 13th June 1879, conveyed it to Nanhak Joti and Gauri Partab Kuar, the defendants in this suit. The present suit was thereupon instituted on behalf of the plaintiffs, the minor sons of Raj Kumar, against their father, the auction-purchasers, and the assignees of the auction-purchasers, in which the plaintiffs claimed possession of the share on the ground that it was the joint ancestral property of their family, and its alienation by their father was invalid, such alienation having been made for unlawful and unnecessary purposes. The assignees of the auction-purchasers alone defended the suit. They set up as a defence to it, amongst other things, that the share had been alienated by Raj Kumar for the maintenance of his family and other necessary purposes and such an alienation was lawful. The Court of first instance held that, inasmuch as the bond-debt had been incurred by Raj Kumar for necessary and lawful purposes, the rights and interests of his sons in the share passed to the auction-purchasers by the sale to them of their father's rights and interests therein. On appeal by the plaintiffs the lower appellate Court, having regard to the sale-proceedings, held that the auction-purchasers only acquired the rights and interests of Raj Kumar by the sale, and gave the plaintiffs a decree for the possession of the share, and a declaration that the auction-purchasers had only acquired such rights and interests.

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The assignees of the auction-purchasers appealed to the High Court, contending that the auction-purchasers had acquired by the sale the entire interests of the family in the share.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), Munshis Hanuman Prasad and Kashi Prasad, and Babu Oprokash Chandar Mukarji for the appellants.

Messrs. Colvin and Niblett and Babu Baroda Prasad Ghose for the respondents.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The defendants-appellants obtained a decree against Raj Kumar, the father of plaintiffs, and against his cousin on a bond in which the joint family property was hypothecated. They executed the decree by attaching the whole joint property. The sons of Raj Kumar, plaintiffs, took objections in execution to the effect that only their father's right could be sold, and the Munsif executing the decree made an order that "the sale will be of such rights and interests of the debtor Raj Kumar in a 4-anna share of zamindari and sir-lands as a Hindu father has in a joint family"; and he added:—"The extent of such interests cannot now be determined in the miscellaneous department." The decree-holders purchased the property sold, and the sale-certificate declares that such rights only were sold as Raj Kumar had as a Hindu father in a joint family possessed in the property advertised. The Judge has held that the sale only passed Raj Kumar's individual interest, and it appears to us that we cannot say he is wrong, looking at the sale-proceedings, particularly the sale-certificate.

It is urged that the intention was to sell, not only Raj Kumar's own interest, but also his sons,' supposing it should be found in a regular suit that the latter could be sold in execution of such a decree as had been obtained in this case against Raj Kumar. But the question as to what interests could be sold under the decree against Raj Kumar depended on whether the decree was given against him in his representative capacity, and was one

which the Court executing the decree could and should have determined; and I do not think that it can be said that this question was the one which the Munsif disposed of in his order. The question about which he appears to have been doubtful was the extent of the interest which a Hindu father by Hindu law could be held to possess in joint family property, and he refused to determine this because, as he expressly says, the extent of such rights cannot be determined in the miscellaneous department. So far he may be right, but he would not have been right if he had, as is suggested, refused to determine and had left open the question as to what property could be sold in execution of the decree he was executing, whether under it the sons' interests were saleable. The Munsif, considering that the extent of the father's rights could not be determined in the miscellaneous department, limited the sale to the father's interest, leaving its extent to be afterwards determined. If he meant to do what is suggested by appellants' pleader, his order does not express his meaning, and it would not have been a proper order. The language of the order and of the sale-certificate is plain, and under the latter the auction-purchasers can be held only to have bought Raj Kumar's interest. Raj Kumar may have, as a Hindu father, a power of dealing with his sons' interests, but that circumstance will not make those interests his own, so as to pass them by a sale which affects his own interests only. I think we should accept the plain language of the sale-certificate. I would dismiss the appeal with costs.

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CHAUBEY.*Appeal dismissed.**Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.*

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UMRAO LAL AND ANOTHER (DEFENDANTS) v. BEHARI SINGH AND ANOTHER (PLAINTIFFS).*

November 29.

Instalment-Bond—Hypothecation—Declaratory decree—Res judicata—Act X of 1877 (Civil Procedure Code), s. 13.

In 1864 the obligee of an instalment-bond, in which certain immoveable property was hypothecated as collateral security for the payment of the

* Second Appeal, No. 544 of 1880, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shahjahanpur, dated the 4th March 1880, affirming a decree of Babu Becharam Chakarbati, Munsif of Dataganj, dated the 15th December 1879.

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instalments, brought a suit upon such bond "against Z and A (the obligors) and the property hypothecated in the bond, defendants," claiming to recover instalments which were due and unpaid, and a declaration of his right to recover instalments which were not due as they fell due. He obtained a decree in such suit for "the amount claimed" against the "two defendants." It was also provided in such decree that, "until the satisfaction of the entire amount of the bond, the plaintiff can realize the amount of each instalment by executing this decree." The obligee applied in execution of such decree to recover, by the sale of such property, which had passed into the hands of third parties after the passing of such decree, instalments which had become due after the passing of such decree and had not been paid. Such execution having been refused on the ground that such decree was a money-decree, the obligee brought a second suit upon such bond to recover such instalments by the enforcement of the lien therein created on such property.

Held that, although the enforcement of such lien was claimed in the former suit, yet, inasmuch as it was very questionable whether the Court was competent to grant the second relief claimed in that suit, viz., a declaration of right to recover instalments which were not due, in execution of a decree for instalments which were due, and the claim in the second suit was not the same as that in the former suit, the plaintiff asking for instalments said to be actually due, and not for a declaratory decree for instalments not due, the second suit was not barred by s. 13 of Act X of 1877.

ON the 15th March 1861, one Rudra Singh and one Ajaipal Singh gave one Mahtab Singh a bond for the payment of certain moneys by instalments, in which they hypothecated a share of a certain village as collateral security for such payment. In August 1864, Mahtab Singh sued on such bond for the instalments which had become due thereunder and had not been paid, and for a declaration of his right to recover as they fell due the instalments which were payable thereunder. He claimed in that suit as against Rudra Singh and Ajaipal Singh "and the zamindari property hypothecated in the bond, defendants." He obtained a decree in that suit in the following terms:—"The amount claimed, with costs, and interest at 2 rupees per cent. per mensem from the date of the institution of the suit till the date of payment, is decreed against the two defendants, the answering defendant to bear his own costs: until the satisfaction of the total amount of the bond of the plaintiff can realize the amount of each instalment by the execution of this decree." He applied to recover in execution of this decree the amount of the instalments which had become due and had been paid, by the attachment and sale of the share hypothecated in the bond. On

the share being attached Rudra Singh and Ajaipal Singh paid such amount. While the share was under attachment, they hypothecated it as security for certain moneys which they had borrowed from one Umrao Lal and one Pitambar Das. The latter obtained a decree enforcing this hypothecation, in the execution of which the share was put up for sale, and was purchased by them. The legal representatives of Mahtab Singh subsequently applied to recover in the execution of the decree of 1864 the amount of instalments which had fallen due after the date of that decree and had not been paid, by the attachment and sale of the share. Thereupon Umrao Lal and Pitambar Das objected, and the Court executing the decree allowed their objections, holding that the decree was mere money-decree, and that the decree holders should enforce their lien on the share by suit, and removed the attachment. The legal representatives of Mahtab Singh consequently brought the present suit against the legal representatives of Umrao Lal and Pitambar Das and of the obligors of the bond of the 15th March 1861, in which they claimed to recover on such bond the amount of ten instalments payable between September 1866, and September 1876, by the sale of the hypothecated share. The legal representatives of Umrao Lal and Pitambar Das set up as a defence to the suit that it was barred by the provisions of s. 13 of Act X of 1877, inasmuch as the enforcement of the hypothecation had been claimed in the former suit on the bond, and had not been granted. The Court of first instance held on the issue arising out of this defence as follows:—
 “As regards the second issue it appears that the plaint in the suit instituted by Mahtab Singh in the Court of the Sudder Amin of Budaun has been destroyed. It is the decree only which is left from which it can be ascertained what Mahtab Singh's claim was. On referring to the decree I find that the property in dispute was made a defendant in that case. There was no prayer for the enforcement of the lien. The property was therefore not the subject of the claim, but the thing against which the claim was made. This course was quite irregular. An inanimate thing cannot defend a suit. I am of opinion that making the property a defendant was a useless and meaningless

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proceeding and cannot be considered as a prayer for the sale of that property. It is to be observed that my learned predecessor has taken the same view of the case. I hold that no claim was made in that case for enforcing the lien on the property in dispute in this case. Even if it be granted that enforcement of the lien was sought in that case, still I think the claim against the property related to those instalments only which were then due and not to the unexpired instalments. As regards the unexpired instalments, the claim was merely for a declaration of the plaintiff's right to recover the amounts thereof when they became due, and no present relief was sought. Indeed, a claim for recovery of the amount not due could not have been made; the declaration of right was asked for simply to obviate the necessity of proving the execution of the bond in any future suit. The decree of the Sudder Amin also shows that the *amount claimed* was the sum of the expired instalments; the decree was made in the following terms:—"The amount claimed, with costs, and interest, &c., is decreed against the two defendants, &c., and until the satisfaction of the *total amount of the bond*, the plaintiff can realize the amount of each instalment by the execution of this decree." Whether the decree was properly made or not is a question on which an expression of my opinion is not needed in this case. It is clear that the Sudder Amin considered that the amount claimed was the total of the expired instalments only. His decree recognizes the existence of a part of the bond-debt even after the passing thereof. For these reasons, I hold that, in regard to the amount now claimed, no relief was sought against the mortgaged property in the former case." In the event the Court of first instance gave the plaintiffs a decree, which, on appeal by the legal representatives of Umrao Lal and Pitambar Das, the lower appellate Court affirmed. Those persons thereupon appealed to the High Court, contending that, although the decree in the former suit had not enforced the hypothecation, by making the hypothecated property in that suit a defendant, the obligee had claimed the enforcement of the hypothecation, and therefore could not claim it again under the provisions of s. 13, Act X of 1877.

Mr. C. Dillon and Munshi Sukh Ram for the appellants.

Pandit *Nand Lal* for the respondents.

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The following judgments were delivered by the Court :—

SPANKIE, J.—The first plea on the face of it would seem to have some weight, but when all the circumstances of the case are considered its force disappears. When the former suit was instituted in 1864 it was not unusual, when a party sued to recover a debt by enforcement of a lien on immoveable property, hypothecated as security for the payment of the same, to make the land a defendant. This course was followed in the suit from which the one before us has originated. There were in that suit two obligors who were made defendants. These defendants had hypothecated the property mentioned in the bond as security for the payment of the sum borrowed. Looking at the terms of the decree in 1864 (the plaint itself unfortunately remains no longer a portion of the record), it seems certain that the plaintiff then, now represented by his sons, the plaintiffs in this suit, was attempting to enforce payment of certain expired instalments by proceeding against the obligors of the bond, and the property hypothecated by them and in their possession. The claim was against “Zorawar Singh and Ajaipal Singh and the zamindari property in mauza Lalwa hypothecated in the bond-defendants.” The relief sought was the recovery of those instalments of which the term had expired, and also a declaration of right to recover, as they fell due, instalments, the terms of which had not yet expired. The decree dated 15th August 1864, decreed the amount claimed with costs and interest at 24 per cent. from the date of institution of the suit till date of payment against the two living defendants. It was added that “until the satisfaction of the entire amount of the bond the plaintiff can realize the amount of each instalment by executing this decree.” There does not appear to have been any decree against the property hypothecated in the bond: so far then it was a money-decree that the father of the present plaintiffs obtained, and he succeeded in realizing from the judgment-debtors the sum due upon the expired instalments.

What the present plaintiffs seek is to enforce their lien in satisfaction of the sum now due in consequence of default in payment

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of instalments not due when the decree of 1864 was made, but which the Court declared the plaintiff entitled to recover as they fell due by executing the decree then given to him, which he tried to do, but execution against the property was refused on the ground that the decree of 1864 was simply a money-decree.

It is urged that, as the claim in 1864 was to enforce a lien against hypothecated property, the present claim is barred by s. 13, Act X of 1877. The then plaintiff obtained a money-decree only, and should have appealed, or applied for a review of judgment.

I approve the reasons given in a somewhat similar case by a Bench of this Court,—Special Appeal No. 1323 of 1876, dated the 17th February 1877, in which the hypothecated property had been made a defendant for allowing the suit to be heard upon the merits, although the plaint had been so carelessly framed as to describe the land as a defendant. Here, as in that case, the suit had been brought to enforce the lien, and it was defended on that assumption. But although I regard the claim in 1864 as one to enforce a lien, I do not think that s. 13, Act X of 1877, bars the present claim. I am disposed to regard the second part of the claim for a declaration of right to recover unexpired instalments, by execution of the decree against the defendant for money due on account of expired instalments, as one which the Court should not have entertained. It seems to me very questionable whether the Court had the power to grant such relief in one and the same decree. But if it had the power, the decree-holder did not succeed in getting the relief grant to him, except as regards the sum found to be due, which was discharged in execution of the decree. The present claim is not the same as that formerly brought. The plaintiffs do not ask for any declaratory decree as to unexpired instalments, but come into Court to recover sums said to be actually due and to do so by enforcement of their lien upon the property of their debtors. The action of the Court in execution of the decree of 1864 has forced them to bring the present suit, and they ask for something distinctly different from what was sought in the former suit in respect of these instalments, and I would therefore overrule the first plea in this appeal. (The learned Judge then proceeded to determine the other grounds of

appeal, but it is not material for the purposes of this report to set out the judgment on those grounds.)

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STUART, C.J.—In expressing my concurrence in the opinion of my colleague, Mr. Justice Spankie, on all the material pleas in this appeal, and in his order by which he proposes to dismiss it and affirm the decree of the lower Appellate Court with costs, I desire to notice the very extraordinary circumstance that the land mentioned in the plaint was, by and of itself, as such, and without any stated connection with or relation to any living person, made a defendant in the original suit. Such a proceeding is with all gravity set out in the first reason of appeal and before us as a ground for the plea of *res judicata*. This was altogether unintelligible to me, and it was the first time since my connection with this Court that I had met with such an absurd eccentricity as I must call it, yet I am gravely assured that such at one time was the practice of the old Sudder Court, and my honourable colleague informs me that it was not an unusual practice. I can only say that I am very sorry to hear it, and that the Sudder Court allowed itself to be affected by such a strange fancy. Any such absurdity cannot of course be countenanced by this Court, and I trust the present case is the last I shall meet with in which such a ridiculous plea is attempted. As well might it be maintained that in any other suit the material thing, be it a stick or a stone, which is the subject of judicial inquiry, on the pleas of the parties, might be made a defendant.

We were referred at the hearing to a precedent (not reported)—Special Appeal No. 1323 of 1876 (Pearson, J., and Oldfield, J.), dated the 17th February 1877—by which it was attempted to be shown that this practice of making inanimate matter, such as land, living, acting, and pleading disputants in a law suit, received some countenance from the judgment in that case, but I am glad to observe that, on the contrary, it was emphatically reprobated, for the judgment distinctly states:—"It appears that in the plaint the hypothecated land was described as a defendant, and that the plaintiff sued to recover the debt claimed from all the defendants, that is to say, from the land as well as from the persons impleaded. It is a matter of surprise that the plaint

1880 was admitted without amendment, and shows that sufficient care is not exercised in the examination of plaints.”

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In the present case there was the less reason for having recourse to such a fiction, seeing that the land is now and was at the institution of the suit in the hands of the defendants.

The judgment of the lower appellate Court is affirmed, and the present appeal is dismissed with costs.

Before Mr. Justice Spankie and Mr. Justice Straight.

1880
December 4.

IN THE MATTER OF THE PETITION OF SRIMATI PADDO SUNDARI DASI.*

Act XXVII of 1860, ss. 5, 6—Certificate for collection of Debts—Security—Appeal.

No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of 1860, lies under that Act to the High Court. *In the matter of the petition of Rukmin* (1) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the appellant.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

SPANKIE, J.—A certificate under Act XXVII of 1860 was applied for by Srimati Paddo Sundari Dasi, and an order was made in her favour. But in consequence of the Judge's requirement that she should deposit security to the full value of Company's paper (Rs. 20,000) belonging to the estate of the deceased Prasanno Chandar Singh, whereas the applicant was merely permitted to draw the interest, and security to cover that would have been sufficient, the certificate did not issue. The applicant, Srimati Sundari Dasi, has filed an appeal from the Judge's order. It, however, appears that there is no appeal from the order of the Judge in respect of the amount of security to be

* First Appeal, No. 123 of 1880, from an order of W. C. Turner, Esq., Judge of Agra, dated the 26th May 1880.

(1) I. L. R., 1 All., 287.

taken from the person to whom a certificate may be granted. Under s. 6 of Act XXVII of 1860, the granting of a certificate may be suspended by an appeal to this Court which may declare the party to whom the certificate should be granted, or may direct such further proceeding for the investigation of the title as it shall think fit; or it may, upon petition after a certificate has been granted by the District Court, grant a fresh certificate in supersession of the certificate granted by the District Court. But there the powers of this Court stop. In the case—*In the matter of the petition of Rukmin* (1)—a Division Bench of this Court took this view, following a previous ruling of this Court to the same effect in *Sconea v. Ram Sahu* (2), which is also supported by a decision of the Presidency Court in *Monmohinee Dasi v. Khetter Gopal Dey* (3) referred to in the case of *Rukmin*. At the same time, though we cannot entertain the appeal, we think it right to add that, if the facts are as stated by the applicant, it may well be the case that the District Court is demanding security to a larger amount than is necessary, and on a fresh application to the Judge that officer would probably reconsider his order. We dismiss the appeal; as there is no respondent, no order need be made as to costs.

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Appeal dismissed.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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March 19.

IN THE MATTER OF DAULATIA AND ANOTHER.

Convictions of several offences—Maximum term of punishment—Act X of 1872 (Criminal Procedure Code), ss. 314, 453, 454—Joinder of charges.

Where a person who is accused of several offences of the same kind is tried for each of such offences separately by a Magistrate, the aggregate punishment which such Magistrate can inflict on him in respect of such offences is not limited to twice the amount which he is by his ordinary jurisdiction competent to inflict, but such Magistrate can inflict on him for each offence the punishment which he is by his ordinary jurisdiction competent to inflict.

A person accused of theft on the 1st August and of house-breaking by night in order to steal on the 2nd August, both offences involving a stealing from the

(1) I. L. R., 1 All., 287.

(2) H. C. R., N-W-P., 1870, p. 146.

(3) I. L. R., 1 Cal., 127.

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same person, was charged and tried by a Magistrate of the first class, at the same time, for such offences, and sentenced to rigorous imprisonment for two years for each of such offences. *Held* that the joinder of the charges was regular under s. 453 of Act X of 1872, and the punishment was within the limits prescribed by s. 314.

Empress v. Umada (1) observed on by STRAIGHT, J.

ONE Daulatia and one Debuli were jointly tried before Mr. C. J. Garstin, Senior Assistant Commissioner, Kumaun District, for, firstly, having on or about the first day of August 1879, at Teili Sunoli, stolen grain from the house of one Bachuli, and thereby committed an offence punishable under s. 379 of the Indian Penal Code; and, secondly, for having, on or about the second day of August 1879, at the same place, committed house-breaking by night, with the intention of committing an offence in the house of Bachuli, and stolen therefrom grain and other property, and thereby committed an offence punishable under s. 454 of the Indian Penal Code. These charges were framed in writing on the 25th September 1879. They were also jointly tried with one Jai Kishen before Mr. Garstin, charged, Daulatia with having, on or about the 15th day of July 1879, at Teili Sunoli, assisted Debuli in concealing and disposing of a silver bracelet which she had stolen from one Chamru, and thereby committed an offence punishable under s. 414 of the Indian Penal Code; and Debuli with having, on or about the same day, at the same place, stolen such silver bracelet from Chamru, and thereby committed an offence punishable under s. 379 of the Indian Penal Code. These charges were framed in writing on the 29th of September 1879. They were also jointly tried with other persons before Mr. Garstin, charged with having, on or about the 7th day of May 1879, at Teili Sunoli, stolen certain grain and other property belonging to one Tulasia, and thereby committed an offence punishable under s. 379 of the Indian Penal Code. These charges were also framed on the 29th September 1879. They were found guilty of the charges against them in respect of Bachuli under a judgment dated the 30th September 1879, and were sentenced, Daulatia, on the first charge, to rigorous imprisonment for two years, and on the second charge to further rigorous imprisonment for two years; and Debuli, on the first charge, to rigorous im-

(1) Not reported, decided the 18th July 1879.

prisonment for one year, and on the second charge to further rigorous imprisonment for two years. They were also found guilty, under a second judgment of the same date, of the offences charged against them in respect of Chamru; and were sentenced respectively to rigorous imprisonment for one year. They were also found guilty, under a third judgment of the same date, of the offence charged against them in respect of Tulasia, and were sentenced to rigorous imprisonment for two years for such offence. In his second and third judgments Mr. Garstin directed that the sentences should take effect at the expiration of the terms of imprisonment to which the accused persons had already been sentenced. Daulatia was also jointly tried with one Chub Deo before Mr. Garstin charged with having, on or about the 11th August 1879, at Teili Sunoli, had in his possession certain stolen property belonging to one Bishen Dat, knowing such property to be stolen property, and thereby committed an offence punishable under s. 411 of the Indian Penal Code. This charge was framed on the 30th September 1879. Mr. Garstin stopped the trial of Daulatia on this charge, with regard to the provisions of s. 314 of Act X of 1872, as he had already sentenced him to twice the amount which he was, by his ordinary jurisdiction, competent to inflict, and on the 1st November 1879 committed him to the Court of Session on the charge that he, on or about the 11th day of August 1879, at Teili Sunoli, committed the offence of having stolen property in his possession, and that he had already been convicted under ss. 379, 454, 414, and 379 of the Indian Penal Code, and thereby committed an offence punishable under s. 75 of the Indian Penal Code and within the cognizance of the Court of Session.

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The Commissioner of the Kumaun Division, having regard to the proceedings of Mr. Garstin, referred the following case to the High Court for orders: "A Magistrate sentences A. to imprisonment in four cases amounting in the aggregate to seven years: he has exceeded his powers: A. appeals: I consider that A. deserves seven years as the proper punishment of his crimes, but there is no section under which I can order the Magistrate to quash his proceedings and commit the case to

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the Sessions; and it appears to me that, under the law, I can only reduce the punishment to the number of years within the power of the Magistrate: what ought to be done in such a case"? This reference was laid before Stuart, C.J., and Spankie, J., and was referred by them to the Full Bench, the order of reference being as follows:—

SPANKIE, J.—I am of opinion that the Magistrate has exceeded his powers. I concur in the view taken of s. 314, Criminal Procedure Code, by Mr. Justice Straight in the case noted (1). I am not, however, satisfied that we could do more than reduce the punishment, so as to bring the sentence within the terms of s. 314, Criminal Procedure Code. The Magistrate, I think, when the offender appears to be an habitual offender, should follow the procedure laid down in s. 315 of the Criminal Procedure Code, and in other cases, when evidence has been given which appears to justify a commitment to the Sessions, he should follow the Procedure laid down in s. 196 of the Criminal Procedure Code. It is sufficient for the Magistrate, if he thinks that a case not exclusively triable, but triable by the Sessions Court and also by the Magistrate, ought to be committed to the Sessions, that he record his reasons to that effect and make the commitment, once having satisfied himself that he ought to make the commitment. The terms of the section are that the accused person shall be sent for trial before the Court of Session. In the cases before us, the Magistrate has not recorded his opinion that the offenders ought to be committed to the Sessions Court, but has dealt with them in his own Court and for offences triable, by himself. I cannot say that he has acted without jurisdiction. The Commissioner of Kumaun allows that by law he can only reduce the punishment to the number of years within the powers of the Magistrate, and he asks what is to be done in such a case? I have endeavoured to show what can and ought to be done, and perhaps what I have said would be sufficient for the guidance of the Commissioner and Magistrate for the future. We, as a Court of Revision, could not enhance the sentences. If we considered that they had been *inadequate*, we might have passed a proper

(1) *Empress v. Umeda*, decided the 18th July 1879, not reported.

sentence in each case, but we cannot say that the offences were not triable by the Magistrate. In considering the effect of the first paragraph of s. 297, we must not overlook the definitions of "trial" and "judicial proceeding" in s. 4 of the Criminal Procedure Code. If we consider that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, we may annul the trial and order a new trial before a competent Court. If we consider that a sentence passed on an accused person is one which cannot legally be passed for the offence of which the accused person has been convicted or might have been legally convicted upon the facts of the case, we may annul the sentence and pass a sentence in accordance with law. But this is not the case in the records submitted to us. The material error has not been in a "judicial proceeding," but the error has occurred in the "trial" after the charge had been drawn up, and trial includes the punishment of the offender. The sentences are wrong in law and must be set right. I would therefore, reduce the sentences so as to bring them within the provisions of the third paragraph of s. 314 of the Criminal Procedure Code. It appears that the Commissioner reports that, since he sent up the cases to this Court, he has submitted another, which has been committed to this Court. I see no reason why he should not go on with the commitment in this case which was not committed until the 1st November 1879, and was not tried simultaneously with the other cases.

STUART, C.J.—In these cases referred to us by the Commissioner of Kumaun, we can of course, under s. 297, Criminal Procedure Code, entertain and dispose of such of them as have been tried by the Magistrate, such trial being in my opinion a judicial proceeding within the meaning of that section. The Magistrate had clearly jurisdiction to try the cases, and at "one trial," if the facts allowed of that, and in that case he could only pass the sentence or sentences which are warranted by s. 314 of the Criminal Procedure Code. That section of the Code limits his powers to a punishment which "shall not in the aggregate, exceed twice the amount of punishment which he is by his ordinary jurisdiction competent to inflict," or, in

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other words, a punishment of four years, being the limit of the Magistrate's powers within his ordinary jurisdiction. In one of the cases before us in this reference, that of Daulatia, there are four convictions and sentences, the latter amounting in the aggregate to seven years' imprisonment, and these, if s. 314 applies, we must reduce to four years' rigorous imprisonment; and in another of the cases, that of Debuli, there are three convictions against her and three sentences amounting altogether to six years' rigorous imprisonment, but these sentences we must also reduce to the limit of four years, if s. 314 applies. The sentence in the case of Bhawani was within the Magistrate's powers, and as to Jaikishen, it appears that, on appeal to the Commissioner, he was acquitted. In regard to the last case reported by the Commissioner, the only order I would make would be to instruct him to proceed with the trial before himself on the Magistrate's commitment. What I have suggested respecting the cases of Daulatia and Debuli is on the hypothesis that s. 314 applies to their cases. But I entertained at the hearing and still entertain serious doubts whether the proceedings before the Magistrate in the cases of these two accused persons formed "one trial" within the meaning of s. 314, and this question I would refer to the Full Bench of the Court. It appears that the proceedings were not continuous in the legal sense. They occupied three days, the 24th, 25th, and 26th of September last, but, although judgment was given in each case on one and the same date, the charges, against these two persons were separate, the evidence was separate, and the proceedings which constituted the trial were separate. So that we have not the case of one indictment containing different counts on the same facts, but separate and distinct cases in regard to the facts themselves the evidence and procedure, a state of things which, in my opinion, is not affected by the judgments in the several cases being all delivered on a subsequent although one and the same day. A judgment by my honourable and learned colleague Mr. Justice Straight, on the meaning and application of s. 314 to trials and sentences by Magistrates was referred to, and nothing could be more correct than what he ruled (1). Indeed, what was so ruled is so obvious a reading of s. 314 as to exclude the pos-

(1) *Empress v. Umeda*, decided the 18th July 1879, not reported.

sibility of the slightest criticism or objection, but it has no application to the difficulty I feel in the present case, viz., whether the proceedings which were had in the cases of the two accused persons, Daulatia and Debuli, were separate trials according to the definition of "trial" in s. 4 of the Criminal Procedure Code, or constituted "one trial" within the meaning and application of s. 314? This question I would refer to the Full Bench.

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The Junior Government Pleader (Babu Dwarka Nath Banarji),
for the Crown.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—The opinion indicated in my referring order in this case was fully confirmed in my mind at the hearing before the Full Bench. It is quite true that the Magistrate had jurisdiction to try these cases, but it is equally clear that the proceedings before him constituted distinct trials and not "one trial" within the meaning of the definition of "trial" in s. 4, Criminal Procedure Code, and within the meaning and application of s. 314, Criminal Procedure Code, the facts being different, the evidence different, and the procedure different. The Commissioner of Kumaun may therefore be informed in answer to his letter to the Registrar that we differ from him, and that the Magistrate in these cases has not exceeded his powers, but that the sentences he has passed must stand.

PEARSON, J.—S. 314, Act X of 1872, provides for cases in which a person is convicted at one trial of two or more offences, punishable under the same or different sections of any law for the time being in force, and empowers the Court to sentence him for the several offences of which he has been convicted to the several penalties prescribed by such enactment or enactments which such Court is competent to inflict, such penalties when consisting of imprisonment or transportation to commence one after the expiration of the other. It declares that it shall not be necessary for the Court by reason of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict for a single offence to send the offender for trial before a higher Court. It provides that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed

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In the case in which Daulatia was charged with having committed offences under ss. 379 and 454, and Debuli with having committed offences under ss. 380 and 454, Indian Penal Code, on the premises of Bachuli, on or about the 1st and 2nd August 1879, and they were sentenced on the 30th September 1879, the first to two years' rigorous imprisonment under s. 379 and two years' rigorous imprisonment under s. 454, and the second to one year's rigorous imprisonment under s. 380 and two years' rigorous imprisonment under s. 454, Indian Penal Code, the joinder of charges appears to have been regular under s. 453, and the punishment to be within the limits prescribed by s. 314, Act X of 1872.

The same persons were separately tried for offences under s. 379, Indian Penal Code, committed on or about the 7th May 1879, in respect of property belonging to Tulasia, and were sentenced on the 30th September 1879 each to two years' rigorous imprisonment to commence at the expiration of the term which they were already undergoing. They were also separately tried for offences committed under ss. 379 and 414, Indian Penal Code, respectively, on or about the 15th July 1879, in respect of property belonging to Chamru, and were sentenced each on the 30th September 1879, to one year's rigorous imprisonment to commence on the expiry of the last term for which they had been already sentenced. The sentences in the two last cases last mentioned appear to be legal under the provisions of s. 317, Act X of 1872. I agree with the learned Chief Justice in the opinion that the provisions of s. 314 of that Act do not apply to those two cases. The circumstances that they were decided on the same date, and that the first mentioned case was also decided on the same date, cannot have the effect of amalgamating the three cases so as to make them one. The proceedings in each of the three cases were perfectly distinct and each was disposed of by a separate judgment.

STRAIGHT, J.—This is a reference to the Full Bench of a submission for orders from the Commissioner of Kumaun by the

Hon'ble the Chief Justice and Mr. Justice Spankie. The following are the circumstances in respect of which the question of procedure to be considered arises. Two persons, Daulatia and Debuli, were tried and convicted by Mr. C. J. Garstin, Magistrate of the first class, of the following offences:—(i) On 7th of May 1879, stealing grain, the property of Tulasia, under s. 379 of the Penal Code. For this they were severally sentenced to rigorous imprisonment for two years. (ii) On 15th of July 1879, Debuli with stealing a bracelet from a boy named Chamru, s. 379 of the Penal Code, and Daulatia with assisting in concealing and disposing of such bracelet, s. 414; severally sentenced to one year's rigorous imprisonment. (iii) On the 1st August 1879, Daulatia and Debuli, stealing grain, the property of Bachuli; Daulatia under s. 379 sentenced to two years' rigorous imprisonment, and Debuli to one year. In the same trial they were both further charged, convicted, and sentenced to two years' rigorous imprisonment for breaking into the house of Bachuli on the 2nd of August 1879, with intent to commit an offence. To put it shortly, the convictions and sentences stand thus:—

Daulatia	...	(1) s. 379—two years.
		(2) s. 414—one year.
		(3) s. 379—two years.
		(4) s. 454—two years.

Total	...	Seven years.
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Debuli	...	(1) s. 379—two years.
		(2) s. 379—one year.
		(3) s. 380—one year.
		(4) s. 454—two years.

Total	...	Six years.
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The point arising for our consideration is whether the Magistrate has exceeded his powers, or, in other words, was the maximum amount of punishment he could inflict limited to four years' rigorous imprisonment. By s. 20 of the Criminal Procedure Code a

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Magistrate of the first class may pass a sentence of imprisonment not exceeding the term of two years, and he has jurisdiction to try, amongst others, offences against ss. 379, 380, 414, and 454 of the Penal Code. A person convicted upon ss. 379 or 414 is liable to rigorous imprisonment for a term not exceeding three years, while the punishment under s. 380 may extend to seven years and under 454 to ten years. Upon any single conviction for any one of these offences a Magistrate of the first class may punish up to two years and beyond that he may not go. And while it appears that his jurisdiction to try any number of cases against any one person is unlimited, the sentences he can pass are to this extent circumscribed. No doubt under s. 196 of the Criminal Procedure Code he may send an accused person for trial by the Sessions Court, if "the evidence satisfies him" that it is one which ought to be tried in that Court; and by s. 315 he may adopt a similar course if the accused person has been previously convicted of an offence relating to coin or Government stamps or against property and is charged with a like offence, the punishment provided for which is three years or upwards, and if he considers such person to be a habitual offender. But it does not appear to me that these sections should in any way affect the consideration of the present point, namely, whether Daulatia and Debuli were convicted "at one trial of two or more offences, punishable under the same or different sections of any law for the time being in force." It is necessary very carefully to examine these commencing words of s. 314, nor must it be forgotten that in the analogous provision of s. 46, Act XXV of 1861, they were at "one trial" but at "one time." Now the proviso to s. 314, limiting the amount of punishment to be inflicted by a Magistrate is only applicable, where a person is convicted at one trial of two or more offences, punishable under the same or different sections of any law. When we look to the interpretation clause we find "trial" defined to mean "the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender." Next it is important to see what restrictions there are as to the joinder of offences. According to s. 452 there must be a separate charge for every distinct offence and a separate trial, except, when under the terms of s. 453, a person is accused of more offences

than one, of the same kind, within one year of each other, when he may be charged and tried at the same time for any number of them not exceeding three. These directions as to procedure appear to me perfectly clear, and it would therefore seem that there can only be one trial of two or more offences punishable under the same or different sections of any law, where those offences are of the same kind and fall within the terms of s. 453. In the present case the Magistrate seems to have properly joined the two charges of the 1st and 2nd of August in the third trial. They both involved a stealing from the same person and were apparently sufficiently "ejusdem generis" to permit the application of s. 453. The Magistrate had the alternative of trying them separately, but for purposes of expedition and convenience it was obviously proper to take them together, and I cannot help here expressing a hope that the effect of the judgment of this Court will not be to lead Magistrates to separately try charges which ought to be joined and disposed of in one trial in order to enable them to accumulate punishment. Upon examination of the printed record in the present reference, it appears to me that there were three separate trials in the strictest sense of the term, and that upon each of the first two convictions the Magistrate was authorized to punish up to two years' rigorous imprisonment, and, as to the third for the joint offences, to inflict a sentence not exceeding twice the amount he by s. 20 had power to inflict. I am aware that the consequence of holding this view will be that the Magistrates will be in a position to multiply terms of imprisonment, if there only be a sufficient number of charges before them, and I feel very strongly the force of my honourable colleague Mr. Justice Spankie's observations as to the wisdom of allowing so much latitude to the inferior criminal tribunals. I confess I should have preferred to be able to come to a conclusion directly opposite to that at which I have arrived. But whatever views I may entertain as to the policy of vesting in Magistrates such extensive powers to punish, it does not appear to me that the sections of the Criminal Procedure Code to which I have adverted are open to any construction other than that I have placed upon them. Accordingly, I am of opinion that Mr. Garstin's orders of 30th September 1879 are valid and good and cannot be impeached. Each trial was separate from charge to

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sentence, and though the judgments were given and the punishments inflicted all on the same day, they are so distinguished and kept apart that each record is complete in itself.

I desire to add that the case of *Empress v. Umeda* (1), mentioned by the Chief Justice and Mr. Justice Spankie, had not all these characteristics, and the judgment I then gave was based upon the, as I thought, irregular mode in which the Magistrate had decided the charges and inflicted the punishment "*en bloc*," and so to speak in the same breath. In this way it differs from the present case, but in such other respects as it is identical it must be taken that I have reconsidered and altered the view I then entertained.

SPANKIE, J.—Some three cases were referred. I have had the opportunity of reconsidering the opinion I at first entertained regarding the point at issue. I have also had the benefit of reading my honourable and learned colleague Mr. Justice Straight's opinion and I agree with him. As to the last case submitted to us, I think, as before, that the Magistrate has not exceeded his powers and was at liberty to make the commitment to the Sessions Court.

OLDFIELD, J.—I have arrived at the same conclusion as my honourable colleague Mr. Justice Straight that s. 314, Criminal Procedure Code, will not apply to the trials before us, so as to limit the aggregate punishment which the Magistrate could inflict, nor are the convictions and sentences otherwise illegal.

CIVIL JURISDICTION.

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November 9.

Before Mr. Justice Pearson and Mr. Justice Straight.

BHAIRON DIN SINGH (JUDGMENT-DEBTOR) v. RAM SAHAI (AUCTION-PURCHASER).*

Application to set aside sale—Review of judgment—Act X of 1877 (Civil Procedure Code), ss. 311, 626, 629—Order setting aside sale—Appeal.

An application under s. 311 of Act X of 1877 to set aside a sale in execution of a decree having been made by the judgment-debtor, the Court executing the

*Application, No. 54B of 1880, for revision under s. 623 of Act X of 1877 of an order of W. Tyrrell, Esq., Judge of Allahabad, dated the 17th May 1880.

(1) Decided the 18th July 1879, not reported.

decree (Subordinate Judge) disallowed the objections, and passed an order confirming such sale. The judgment-debtor subsequently applied to the Subordinate Judge for a review of judgment. The Subordinate Judge, without recording his reasons for granting such application, and without recording an order granting such application, irregularly proceeded at once to pass an order setting aside such sale, without cancelling the previous order confirming it. The auction-purchaser appealed to the District Judge. That officer, treating the appeal as one from an order granting an application for review of judgment, entertained it, and set aside the Subordinate Judge's second order. *Held* that the District Judge was not justified in entertaining such appeal, such order not being one granting an application for review, but one setting aside a sale, and as such not appealable.

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Before a review of judgment is granted an order granting the application for review and the reasons for granting the same should be recorded.

THE shares of the judgment-debtor in this case in two villages were sold in the execution of the decree on the 21st January 1878. The judgment-debtor objected to the sale on the 4th February 1878, on the ground that owing to the sale not having been properly notified and proclaimed in the villages, purchasers had not attended at the auction, and the property had in consequence fetched a ruinously low price. On the 22nd May 1878, the then Subordinate Judge of Allahabad, the Court executing the decree, disallowed this objection and confirmed the sale, on the ground that there did not appear to have been any irregularity in the publication or conduct of the sale, and mere inadequacy in price was not a sufficient reason for setting it aside. The judgment-debtor did not appeal from this order, but on the 26th June 1878 applied to the Subordinate Judge for a review of judgment, again urging that the sale had been irregularly published. The opposite parties were called on to show cause why this application should not be granted, and on the 13th July 1878 the auction-purchaser preferred objections in writing to the application, and the Subordinate Judge ordered that his objections should be filed. On the 1st August 1878, the Subordinate Judge, at the instance of the judgment-debtor, issued certain questions to the officer who had conducted the sale, replies to which were sent on the 23rd August following. On the 11th October 1879, no proceeding having taken place between that date and the 23rd August 1878, the Subordinate Judge in one and the same order granted the

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review of judgment and set aside the sale on the ground of irregularity in its publication. The decision of the Subordinate Judge concluded in these terms:—"When there is an irregularity in the sale, and the decree-holder and the judgment-debtor both have sustained loss, and when in the event of the sale being cancelled, the debtor can get rid of the demand, and the decree-holder's whole amount can be satisfied, the Court thinks it just to allow the debtor's application for review of judgment by cancelment of sale: It is therefore ordered that the sale held on the 21st January 1878 * * * * be cancelled." On appeal by the auction-purchaser, the District Judge set aside the Subordinate Judge's "order of the 11th October 1879, granting the application for review," for reasons which appear in the following extract from his judgment:—"An appeal would not lie to this Court from the order cancelling the sale; but an appeal lies (s. 629 of Act X of 1877) from the part of the order admitting the application for review. That order is as follows:—'Hence, where there is an irregularity in the sale and the decree-holder and the debtor both have sustained a loss thereby, and from the cancelment of the sale the debtor gets rid of the demand of the decree and the decree-holder's whole amount can be thus satisfied, the Court thinks it just to allow the debtor's application for review of judgment by cancelment of the sale.' Thus it appears that the purchaser, who had been invited in June 1878, to show cause against the granting the review, was not heard in that behalf, but in one and the same proceeding the review was granted, because the Court found out for itself reasons for thinking the sale not good, and the sale was cancelled by virtue of the granting of the review. The order granting the review is challenged on the following grounds:—(i) The order is defective, in that the Court did not assign any reason in its judgment for granting the review, as it should have done under s. 626 of Act X of 1877; and (ii) it is bad in law, inasmuch as the petitioner did not offer any reasonable cause in his petition, as prescribed in s. 623 of Act X of 1877, and the lower Court also granted it without assigning any reason for so doing. I think that these objections are good and must be allowed. Not one of the reasons put forward in his petition on the 26th June is such as could be pleaded under the terms of s. 623 of Act X of 1877. No

allegation was made of new and important matter or evidence. No mistake or error was pretended to have become apparent on the face of the record, and no other sufficient reason was shown, for none was offered which had not been brought before the Court and judicially disposed of at the hearing of May 1878. I cannot think that the Court's suggestions of certain hypothetical flaws in the sale-proceedings, which had not been stated or pleaded in the application for the review, or its discovery of the convenience to the decree-holder and debtor that would follow from the cancelment of the sale under the cover of an order made in review of judgment, can be justly regarded as the record of the Judge's opinion with the reasons in favour of granting the application for review in the full sense of s. 626 of the Code, though they may possibly form good grounds for cancelling the sale. The pleadings of the petition of 26th June 1878 might have been good in an appeal against the Subordinate Judge's order of the 22nd May 1878, but they furnish no grounds for his granting a review of that order; and he did not write that any of these pleas for med his reasons for so doing. I therefore find that the order of the 11th October 1879, granting the application for the review, was made in contravention of the provisions of s. 626 of the Code, and consequently that order and all that has been done under it must fall to the ground. It is set aside with costs."

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The judgment-debtor preferred an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, on the ground that the order of the Subordinate Judge of the 11th October 1879 was not appealable, and the District Judge had consequently, in entertaining an appeal from that order, exercised a jurisdiction not vested in him by law.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath* for the judgment-debtor.

Mr. *K. M. Chatarji* for the auction-purchaser.

The High Court (PEARSON, J., and STRAIGHT, J.,) delivered the following judgment:—

PEARSON, J.—S. 626 of the Procedure Code enacts that, if a Court be of opinion that an application for a review should be

1880 granted, it shall grant the same and the Judge shall record with
 BHAIROD his own hand the reasons for such opinion. That an order granting
 DIN SINGH the application should be recorded is also clearly inferrible from
 v. RAM SAHAI. the provision made in s. 629 for an appeal against such an
 order. Such an order must necessarily be quite distinct from the
 final order made in the matter, for it must be preliminary thereto.
 By the order granting the application for review, the order
 impugned by that application is directed to be brought forward
 for review, which is a separate and subsequent proceeding. The
 procedure of the Subordinate Judge in the case before us was,
 in our opinion, extremely irregular. He omitted to record his
 reasons for granting the application for review, and he likewise
 omitted to record an order granting that application, and proceeded
 at once thereupon to pass an order setting aside the sale of the
 21st January 1878, which had been confirmed by his previous
 order of the 22nd May 1878, without cancelling that order. But
 irregular as was the Subordinate Judge's procedure, we cannot
 consider that the Zila Judge was justified in entertaining the
 appeal preferred to him against the Subordinate Judge's order of
 the 11th October 1879, which was not an order granting an
 application for review, but one setting aside a sale, and as such
 was not appealable under Act X of 1877 as amended by Act XII
 of 1879. Accordingly, under the provisions of s. 622 of the Code,
 we cancel the proceedings of both the lower Courts and direct the
 Subordinate Judge to dispose afresh of the application for review
 according to law. The costs of this application will follow the event.

APPELLATE CIVIL.

1880
 November 17.

Before Mr. Justice Spankie and Mr. Justice Straight.

GHANSHAM (DECREE-HOLDER) v. MUKHA AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Application to keep in force decree—Step in aid of execution—Act IX of 1871 (Limitation Act), sch. ii, No. 167—Act XV of 1877 (Limitation Act), sch. ii, No. 179.

An application by a judgment-debtor stating that the proceedings in execution had been adjusted, and he had paid the decree-holder Rs. 10, and would pay him the balance of the decretal amount subsequently, and praying that

* Second Appeal, No. 55 of 1880, from an order of B. G. Currie, Esq., Judge of Aligarh, dated the 16th May 1880, reversing an order of Munshi Izzat Rai, Munsif of Khair, dated the 20th March 1880.

the execution case might be struck off, is an application to "keep in force the decree," within the meaning of No. 167, sch. ii of Act IX of 1871, and a "step in aid of execution of the decree," within the meaning of No. 179, sch. ii of Act XV of 1877.

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APPLICATION for execution of the decree in this case was made on the 18th November 1876. On the 14th December 1876, one of the judgment-debtors presented an application to the Court executing the decree to the following effect:—"In the above case the matter has been adjusted between the petitioner and the decree-holder: accordingly the petitioner has paid the decree-holder Rs. 10 towards the amount of the decree: I shall pay the balance hereafter with the decree-holder's consent: the petitioner prays that the case may be struck off." At the time this application was presented the decree-holder's vakil presented a receipt for the Rs. 10 mentioned in the application. The next, or the present, application for execution of the decree was presented on the 15th December 1879. The judgment-debtors objected that the application was barred by limitation. The Court held that the application was within time, as limitation should be computed from the date of the application of the 14th December 1876, that application being one which kept the decree in force, under the provisions of Act XV of 1877, sch. ii, No. 179. On appeal by the judgment-debtors the lower appellate Court held that that application did not keep the decree alive, and the present application for execution was barred by limitation. The decree-holder appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji* for the appellant.

Lala *Jokhu Lal* for the respondents.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—We think that the petition of the judgment-debtor filed in the execution department on the 14th December 1876 was an application to "keep in force the decree," as required by No. 167, sch. ii of Act IX of 1877, as also a step in aid of execution of the decree," as provided by No. 179, sch. ii of Act XV of 1877. The appeal is decreed with costs, and the decree-holder may proceed with the execution of the decree.

Appeal allowed.

1880
November 16.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

EMPRESS OF INDIA v. BALDEO.

False charge—Contempt—Prosecution—Charge—Act XLV of 1860 (Penal Code), s. 211—Act X of 1872 (Criminal Procedure Code), ss. 468, 473.

B charged certain persons before a police officer with theft. Such charge was brought by the police to the notice of the Magistrate having jurisdiction, who directed the police to investigate into the truth of such charge. Having ascertained that such charge was false, such Magistrate took proceedings against *B* on a charge of making a false charge of an offence—an offence punishable under s. 211 of the Penal Code, and convicted him of that offence.

Held that, as such false charge was not preferred by *B* before such Magistrate, the offence of making it was not a contempt of such Magistrate's authority, and the provisions of ss. 468 and 473 of Act X of 1872 were inapplicable, and such Magistrate was not precluded from trying *B* himself, nor was his sanction or that of some superior Court necessary for *B*'s trial by another officer. *Empress v. Kashmiri Lal* (1) distinguished.

Observations by STUART, C.J., on the careless manner in which the charge in this case was framed.

THIS was an appeal by the Local Government against a judgment of Mr. M. S. Howell, Sessions Judge of Jaunpur, dated the 22nd May 1880, acquitting on appeal one Baldeo charged with an offence under s. 211 of the Indian Penal Code. It appeared that Baldeo had on the 29th March 1880 reported at a police-station that two persons named Rachpal and Sidhu had stolen certain property belonging to his master. The case was investigated, and the police officer who made the investigation reported that the charge made by Baldeo was false. The District Superintendent of Police, being of opinion that Baldeo had committed an offence punishable under s. 182 of the Indian Penal Code, directed that the matter should be laid before the Magistrate having jurisdiction in the matter, Mr. W. Lambe; who ordered the police to direct Baldeo to produce evidence of the theft within ten days, if he could do so. The police having reported that Baldeo had replied in answer to such direction that he had no charge to prefer and no evidence to produce, the Magistrate instituted proceedings against him, and charged him, under s. 211 of the

(1) I. L. R., 1 All., 625.

Indian Penal Code, with making a false charge of theft. The Magistrate convicted him of this charge and sentenced him to rigorous imprisonment for three months. On appeal by Baldeo to the Court of Session it was contended on his behalf that the Magistrate was not competent to try him himself, regard being had to the provisions of s. 473 of Act X of 1872. The Sessions Judge, Mr. M. S. Howell, allowed this contention, and quashed Baldeo's conviction, for the following reasons:—"It seems to have been settled (I. L. R., 1 All., 625,) that s. 473, Criminal Procedure Code, is not limited merely to contempts under chapter X of the Indian Penal Code, but applies also to the offence of giving false evidence under s. 193, which belongs to chapter XI, and by parity of reasoning to s. 211, as Mr. Justice Pearson expressly states: it seems therefore that the Joint-Magistrate could not try the appellant for making a false charge, which was intended to be brought, and was, indeed, actually brought, before his own Court, by means of the police report: I think that, if the Joint-Magistrate had taken up the case under s. 182, on the authority of the District Superintendent's sanction, given under s. 467, Criminal Procedure Code, he would not have been debarred by s. 473, Criminal Procedure Code, from trying it; but he chose to take up the case under s. 211, for which the Superintendent could give no sanction, and for which the Joint-Magistrate's own sanction, or that of some superior Court, was requisite, under s. 468, Criminal Procedure Code."

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The Local Government appealed to the High Court from the Sessions Judge's judgment, on the ground that the Magistrate was not debarred by s. 473 of Act X of 1872 from trying Baldeo himself.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the Crown.

Babu Ram Das Chakarbati for the respondent.

The following judgments were delivered by the Court:—

STUART, C.J.—This is an appeal by Government under s. 272, Criminal Procedure Code, against the judgment of the Sessions

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Judge of Jaunpur, setting aside the conviction and sentence by the Joint-Magistrate in the case of one Baldeo Pathak, who was charged under s. 211 of the Indian Penal Code. That section provides: "Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished, &c." The police reported the case in the usual manner, and after hearing evidence on that report the Magistrate committed the case for trial, and afterwards tried the case himself. He was, in my opinion, quite competent, to try the case, but not on such a commitment as he made, for he very irregularly and improperly committed the case in the following terms:—"I, Mr. Lambe, hereby charge you, Baldeo Pathak, as follows:—That you, on or about the 29th March, 187 (?), at the Baksha station, gave false information of the theft of *arhar* to the police against Rachpal Pathak and Sidhu Lohar, with intent to cause injury, and committed an offence: therefore you committed the offence which is punishable under s. 211 of the Indian Penal Code, and within the cognizance of the *Court of Session*: and I hereby direct that you be tried by the *said Court* on the said charge": thus committing to the Court of the Judge, whereas the case was one clearly triable, and it was actually tried, by himself as a Magistrate of the first class. I have before me the original order of commitment in the vernacular, and it is correctly and indeed literally translated in the paper-book of this appeal, therefore neither the translator nor the printer are to blame, but the error must be laid to the door of those officially responsible for the state of the record, and I am afraid that it has been brought about by extreme carelessness either on the part of the Magistrate himself or of the officers to whom the duty of preparing the order of commitment was intrusted. The error, or careless irregularity as it may be called, was in utter disregard of the direction contained in No. (10), sch. iii of the Criminal Procedure Code, headed "Charges," and in which No. (10) there is the following direction:—"In cases tried by a Magistrate substitute 'within my cognizance' for 'within the cognizance of the Court of Session.' In (d) omit 'by the said

Court' ”; “(d)” here is evidently a misprint for (c), as there is no (d) in the schedule, and (c) evidently is intended. No objection, however, appears to have been taken to this irregularity, and the case was tried by the Magistrate properly and legally, so far as I consider, according to his powers, although without any order of commitment to himself. I have, however, considered it my duty to notice such carelessness in the preparation of orders of commitment in order that they may in future be avoided, not only by the Magistrate of Jaunpur, but by all Magistrates and Judges of Districts in these Provinces.

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The facts relied on by the prosecution were these:—On the 29th of March last, the accused, Baldeo, reported to the police at Baksha police-station, that at midnight of the previous day two persons named Sidhu and Rachpal had come into his master's field and broken or plucked some *arhar* stalks, and Baldeo therefore charged these men with theft, and requested that the case might be investigated. This investigation was taken in hand by a police officer named Ilahi Bakhsh, who, when examined before the Magistrate, stated that Baldeo was unable to produce any proof of his charge, which had, he said, been evidently trumped up by Baldeo, and he said that the motive for the false charge was hostility or “enmity” on the part of Baldeo, because he wanted to marry a sister of Rachpal, but had not been allowed. This state of the case was sufficiently supported at the trial before the Magistrate, and there was evidence also of an *alibi* in the case of Rachpal. The Magistrate, therefore convicted Baldeo under s. 211, Indian Penal Code, and sentenced him to three months' rigorous imprisonment. On appeal to the Judge it was contended on behalf of the accused that what he had done at the police-station did not amount to a formal complaint to a Magistrate, and that a mere report to the police does not afford ground for a prosecution under s. 473, Criminal Procedure Code. This plea the Judge overruled, but he at the same time held, conformably with his understanding of the meaning of the Full Bench ruling in *Empress v. Kashmiri Lal* (1), that the Magistrate had no power to try the case.

(1) I. L. R., 1 All., 626.

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On both these points the Judge was clearly wrong. Baldeo's report to the police was not a formal complaint to a Magistrate, and was neither an offence committed before or against a Civil or Criminal Court. It was therefore such an offence as the Magistrate himself had full powers to try. As to the Full Bench case, I was myself one of the Judges who heard it, and I dissented from the opinions of my colleagues. But it must be allowed that the question there raised, as well as the question whether s. 211, Indian Penal Code, falls within the category of contempts within the meaning of the Indian Penal Code and the Code of Criminal Procedure, is attended with some difficulty, and chiefly in consequence of there being no definition in the Indian Penal Code or in the Criminal Procedure Code of the word "contempt." In England a contempt of Court has a precise and definitive meaning, by which it is restricted to offences not against the criminal law generally as these affect Courts of Justice, but to offences directly against the authority of the Courts themselves and their process, and of course such other offences as are declared by the statute to be contempts. Another difficulty is occasioned by the variety or rather want of identity of language in the Codes in regard to such questions as were raised in the Full Bench case, and also in regard to s. 211. Thus there is a whole chapter of the Penal Code, chapter X, which deals with the subject of "contempt of the lawful authority of public servants," in which apparently are included the process and orders of Courts of Justice, and neither s. 193 nor s. 211 are to be found within the provisions of that chapter. The offences contemplated by these sections, however, form part of chapter XI of the Penal Code entitled "of false evidence and offences against public justice," which it appears to me are not necessarily contempts. Another difficulty arises in the present case from the wording of s. 473 of the Criminal Procedure Code, which provides that, with certain exceptions, "no Court shall try any person for an offence committed in contempt of its own authority," and my honourable colleague, Mr. Justice Pearson, is of opinion that such an offence is covered by s. 468, which treats of "a complaint of an offence against public justice," which the offence defined by s. 211 of the Penal Code undoubtedly is, but

is it therefore an offence committed "in contempt of the lawful authority of a Court"? That I think may be doubted, although I say again such may have been the intention of the framers of the Criminal Procedure Code. The law on the subject is by no means clear, but in the present case we need not trouble ourselves with speculations respecting the meaning of these sections of the Penal Code and the Code of Criminal Procedure, seeing that Baldeo's offence against s. 211 of the Penal Code was not such as is provided against by s. 473, seeing it was neither committed in contempt of nor before or against a Civil or Criminal Court. The offence was therefore triable by the Magistrate himself without any sanction and in virtue of his own powers. The present appeal must therefore be allowed, the judgment of the Judge reversed, and the conviction and sentence by the Joint-Magistrate (in support of which there appears to be, as I have already stated, ample evidence) restored.

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PEARSON, J.—My judgment, dated 22nd August 1877, in the case of *Empress v. Kashmiri Lal* (1), which came before the Full Bench, recognizes the offence described in s. 211, Indian Penal Code, as a contempt of Court, when committed before or against a Civil or Criminal Court, in reference to and in accordance with the provisions of ss. 468 and 473, Act X of 1872. But in the case brought before us by the present appeal the offence under the afore-said section of which Baldeo had been convicted was not committed before or against a Civil or Criminal Court, but at the Baksha police-station. The false charge of theft was made to Kudrat-ul-lah, assistant clerk at that station, and was never preferred by Baldeo in the Joint-Magistrate's Court. This being so, I am of opinion that the provisions of ss. 468 and 473, Act X of 1872, are inapplicable, and that the Sessions Judge has erred in ruling that the Joint-Magistrate could not try the case himself or that his sanction or that of some superior Court was necessary to its trial by another officer. I would therefore allow the appeal, reverse the Sessions Judge's order, and restore the finding and sentence of the Joint-Magistrate.

Appeal allowed.

(1) I. L. R., 1 All., 625.

1880
November 17.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

MAKUNDI KUAR (PLAINTIFF) v. BALKISHEN DAS AND OTHERS
(DEFENDANTS).*

Suit for interest—Suit for money payable on demand—Suit for money deposited payable on demand—Act XV of 1877 (Limitation Act), sch. ii, Nos. 59, 60, 63.

The plaintiff in this suit deposited certain money with the defendants, a firm of bankers, on the 30th August 1863. On the 2nd January 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit and interest on the same calculated at six per cent. per annum. On the 11th February 1876, the defendants having proposed to pay the plaintiff such balance, together with interest on the original deposit, from the 2nd January 1867 to the 15th February 1876, calculated at four per cent. per annum, the plaintiff demanded that she should be paid such interest at the rate of six per cent. per annum. The defendants refused to accede to this demand on the 14th February 1876, and on the 17th of the same month they paid the plaintiff such balance with such interest calculated at the rate they proposed, *viz.*, four per cent. On the 11th February 1879, the plaintiff brought the present suit against the defendants in which she claimed the sum representing the difference between such interest calculated at four per cent. and six per cent.; alleging that her cause of action arose on the 14th February 1876. *Held* that the defendants were estopped from questioning the plaintiff's demand for such interest calculated at six per cent. *Held* also that the suit could not be regarded as either one for money lent under an agreement that it should be payable on demand, or one for money deposited under an agreement that it should be payable on demand, but must be regarded as one for a balance of money payable for interest for money due, to which cl. IX., s. 1 of Act XIV of 1859, No. 61, sch. ii of Act IX of 1871, and No. 63, sch. ii of Act XV of 1877 had successively applied, and the suit was barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi Kashi Prasad for the appellant.

The *Senior Government Pleader* (Lala Juula Prasad) and Pandits Ajudhia Nath and Bishambhar Nath for the respondents.

The High Court (SPANKIE, J., and STRAIGHT, J.) delivered the following

JUDGMENT.—According to the prayer of the plaint this suit is brought to recover the sum of Rs. 12,150-2-6, alleged balance

* First Appeal, No. 9 of 1880, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated 6th September 1879.

of interest, due from the defendants to the plaintiff on an amount of Rs. 61,056, from the 2nd of January 1867 to the 15th of February 1876. The circumstances out of which the claim arises appear to be as follows:—The plaintiff is the wife of Rai Sita Ram, defendant No. 3, who is a member of the same family as the other defendants, and in the year 1873 was a partner with them in a banking firm at Benares, carrying on business under the style of Rai Ram Kishen and Rai Sri Kishen. The plaintiff alleges that, having received a sum of Rs. 50,000, as a gift from her husband, out of his self-acquired funds, on the 27th August 1863, she on the 30th of the same month paid the money through his hands into the before mentioned firm as a deposit. She further asserts that, according to a long and well-established custom of the family, money thus deposited by members of it was entitled to interest at the rate of eight annas per cent. per mensem, and as the accounts were adjusted and the interest credited, the interest was treated as part of the principal and itself carried interest at the above rate. It seems that in 1867 the firm of Rai Ram Kishen and Rai Sri Kishen was dissolved, and subsequently a partition suit was brought by defendant No. 2, Rai Narsingh Das, against Rai Narain Das, defendant No. 1. In execution of the decree obtained by the former person, one Syed Ahmad Khan, c.s.r., was appointed commissioner to effectuate partition and determine the accounts between the parties. From the books of the defendants' firm, it appears that on the 2nd January 1867, a balance of the plaintiff's account was struck, and a sum of Rs. 61,056 was found to be due to her. This was made up of four entries, the first one for the principal amount of Rs. 50,000, and the remaining three items of interest from Sambat 1921-22-23 at the rate of eight annas per cent. per mensem. It may be observed in passing that this account does not bear out the plaintiff's allegation, that the practice of the firm was to give compound interest; nor, as a fact, does she by her plaint claim it. In the course of carrying out the duties intrusted to him, it became necessary for the commissioner, Syed Ahmad Khan, to ascertain what amount of interest was due from the defendants' firm, between the 2nd of January 1867, and the 15th February 1876. This he proceeded to calculate at the rate of Rs. 4 per cent. per annum and declared the amount to be

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1880 Rs. 22,265. On the 11th of February 1876, the plaintiff demanded her principal and interest at the rate of Rs. 6 per cent. per annum from the commissioner, but upon the 14th February 1876 he refused to pay it, and upon that date the plaintiff alleges her cause of action to have arisen. On the 17th February 1876, the commissioner paid to her, through the hands of her husband, Rs. 83,321-1-6 instead of Rs. 95,471 which she claimed. It is for the difference between these two sums that the present suit was brought on the 11th February 1879. Rai Sita Ram, defendant No. 3, by his written statement, admitted that the plaintiff was entitled to interest at the rate of eight annas per cent. per mensem, and prayed, as he had not offered any resistance to her claim, that he should be exempted from costs. The remaining defendants pleaded in substance, (i) that the transaction between themselves and the plaintiff was in the nature of a loan, and that therefore the suit was barred by No. 59, sch. ii, Act XV of 1877; (ii) that there is no such custom in the family as that alleged by the plaintiff; (iii) that the Rs. 50,000 was in reality the money of Rai Sita Ram, that he had fictitiously paid it into the firm in the name of his wife, the plaintiff, and that being his money, it was only entitled to interest at Rs. 4 per cent. per annum; (iv) that the higher rate of interest had been entered in the books of the firm of Rai Ram Kishen and Rai Sri Kishen at the instigation of Rai Sita Ram, the husband of the plaintiff, and without the consent of his partners; (v) that in the suit between Rai Narsingh Das and Rai Narain Das for partition, to which Ram Sita Ram was a party, he as the husband of the plaintiff and the real owner of Rs. 50,000 was bound by the decision of this Court as to the rate of interest being Rs. 4 per cent. per annum, and that, having accepted of Rs. 83,321-1-6, it is incompetent for the plaintiff, as his wife, to bring the present suit in contravention of the provisions of s. 13, Act X of 1877; (vi) that the suit is a collusive one, and that Rai Sita Ram is the real plaintiff; (vii) that the amount claimed is in excess of the proper sum due by Rs. 1,017-9-9.

The case was heard before the Subordinate Judge of Benares on the 6th September 1879. With regard to the plea of *res judicata*, he held it inapplicable on the ground that the plaintiff herself was

no party to the suit in the High Court in 1871 ; but, without dealing with the other questions raised, he has decided that the plaintiff's claim is barred both by Act XIV of 1859 and Act XV of 1877. The ground upon which he proceeds is that the transaction between the parties was in the nature of a loan, and that limitation would therefore run from the date when the original loan was made, namely, the 30th August 1863. A great deal of his judgment is taken up in discussing the circumstances relating to the original deposit of the Rs. 50,000 ; but a close examination of the facts of the case shows that this is only of indirect importance. The principal sum of Rs. 50,000 has admittedly been repaid, together with Rs. 11,056 interest due to the 2nd January 1867. But, as has already been pointed out, this latter sum is not made up in the manner alleged by the plaintiff in her plaint, namely, by adding each instalment of interest to the principal sum and allowing compound interest. On the contrary, each of the three items is estimated on Rs. 50,000 only. It would therefore seem that the plaintiff has somewhat unnecessarily introduced the question of compound interest, and having accepted payment of the principal sum with interest, she cannot now properly claim it, and indeed, as a matter of fact, she does not do so. Her suit is actually brought for the recovery of nine years one month and twelve days' difference in interest, between Rs. 4 per cent. per annum and Rs. 6, from the 2nd of January 1867, to the 15th of February 1876. Now it is to be observed that the Rs. 12,150-2-6, which she claims, is not worked out upon a basis of compound interest on Rs. 50,000 from August 1863, as might have been expected, but is the difference in simple interest between 4 and 6 rupees per cent. on the Rs. 61,056, balance struck in the defendants' books in her favour on the 2nd of January 1867 ; nor must the fact be lost sight of that, though items of simple interest only were credited in that account for Sambat 1921-22-23, the interest calculated by the commissioner for the period from 1867 to 1876, at 4 per cent., was in this sense compound, that it was estimated, not on the Rs. 50,000, principal sum, but upon that amount plus the three years' simple interest, in all Rs. 61,056. While therefore, on the one hand, as we have already remarked, the plaintiff could not properly, and does not, claim compound interest ; yet, on the other, it does not lie in the mouths of the defendants to

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question the demand for 6 per cent., when, apart from the entries in their books, they have by payment of the Rs. 61,056 practically admitted interest at that rate to be due down to 1867. We do not quite follow the remarks of the Subordinate Judge with regard to the period of limitation having commenced to run on the 30th of August 1863. In reality, no question arises in the suit concerning the principal sum, for that has been admittedly repaid, as also interest on it at 6 per cent. down to 2nd January 1867; and with reference to the interest now claimed, whether 4 or 6 per cent., no portion of it accrued until the month of January 1867. Now it must be remembered that at this time the firm of Rai Ram Kishen had ceased to carry on business, and was being wound up by the commissioner, and through the succeeding years, until February 1876, the plaintiff's Rs. 50,000, with the annual increments of interest, remained in the hands and at the disposal of the defendants, and we think it must be taken that the relations between the parties continued upon the same footing as they had been down to the date of the balance being struck. No doubt there was no formal carrying of interest to the credit of the plaintiff's account in the defendants' books from 1867 to 1876, but that some interest was payable has never been disputed, and the only point now is, at what rate should it be estimated? With regard then to the matter of limitation, in reference to which the Subordinate Judge dismissed the suit, the question arises, in what light is the difference between the 4 per cent., which has been admitted and paid by the defendants, and the 6 per cent., which is disputed by them, in other words, the contested 2 per cent. to be regarded? Is it money lent under an agreement that it should be payable on demand; or is it money deposited under an agreement that it should be payable on demand; or is it money payable for interest upon money due? We do not think that it can be treated as money lent, nor does it appear to us that, under the circumstances of the case, it can be regarded as a deposit. But it seems naturally and reasonably to fall within the description of a balance of money payable for interest upon money due from the defendants to the plaintiff. To hold it a deposit would be to unreasonably strain construction, and to throw it into the category of loan could not improve the plaintiff's position, so far as limitation is concerned. The Subordinate Judge seems to

have lost sight of the circumstances that, even if his view of the law is correct, and the transaction was one of lending and borrowing, each successive instalment of interest, as it fell due and remained in the hands of the defendants, impliedly became a separate and specific loan, and that, so far as the last two years, namely, 1877 and 1878, are concerned, the suit was not barred. Under all the circumstances, we are of opinion that cl. ix, s. 1, Act XIV of 1859, No. 61, sch. ii. of Act IX of 1871, and No. 63, sch. ii. of Act XV of 1877, have successively been applicable to the relations between the parties, and that the plaintiff's claim is barred by limitation. The appeal must therefore be dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Straight.

BISRAM MAHTON (DECREE-HOLDER) v. SAHIB-UN-NISSA (AUCTION-PURCHASER).*

1880
November 22.

Sale in execution—Holiday—Act X of 1877 (Civil Procedure Code), s. 311—Irregularity in publication or conduct of sale.

The sale of immoveable property by an amín on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.

A CERTAIN dwelling-house was sold in execution of a decree on the 24th November 1879, the sale being conducted by an officer of the Court executing the decree. On the 3rd December 1879, the decree-holder applied to the Court to set aside the sale on the ground that it had taken place on a public holiday, and in consequence the house, which was worth Rs. 300, had been purchased by the sister of the judgment-debtor for Rs. 17. The auction-purchaser of the house opposed this application. The Court disallowed the decree-holder's objection to the sale on the ground that the holding of a sale in execution of a decree on a holiday was not illegal; and made an order confirming the sale. The decree-holder appealed to the High Court.

Munshi Sukh Ram, for the appellant.

* First Appeal, No. 120 of 1880, from an order of **Rai Makhan Lal**, Subordinate Judge of Allahabad, dated the 20th May 1880.

1880

The *Senior Government Pleader* (Lala Juala Prasad) for the respondent.

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SAHIB-UN-
NISSA.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

SPANKIE, J.—We are not prepared to say that the sale of property by an amín of the Court on a close holiday is illegal. We cannot find that such a sale has ever been forbidden by the late Sudder Dewanny Adawlut or by this Court. Sales of land and of rights and interests in land paying revenue to Government during the Dasehra and Muharram vacations were prohibited by a notification of the Sudder Dewanny Adawlut, No. 1649 of 1851, but this prohibition has not been extended to sales by amíns. No rules by this Court for the guidance of the Courts in the exercise of their duties in respect to sales have hitherto been published. There is nothing in Act X of 1877 which forbids sales on a close holiday. Such a sale does not appear to be illegal. Even if it could be contended that the sale of moveable property by an amín on a close holiday was irregular, the irregularity would not vitiate the sale, but the person sustaining the injury may proceed as directed in s. 298 of the Civil Procedure Code. In sales of immoveable property the sale can only be set aside when substantial injury has been caused by reason of material irregularity, as provided in s. 311 of the Code. No material irregularity in publishing or conducting the sale has been shown in the case before us. Still less does it appear to be established that any material injury has been suffered. Consequently we should dismiss the appeal and affirm the order with costs.

1880
November 25.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

ISHRI DAT (PLAINTIFF) v. HAR NARAIN LAL AND OTHERS (DEPENDANTS).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13.

I, to whom the obligee of a bond for the payment of money in which immoveable property was hypothecated, had assigned by sale her right thereunder, sued by virtue of the deed of sale on such bond for the money due thereunde,

* Second Appeal, No. 1032 of 1879, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 9th July 1879, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 27th March 1879.

claiming to recover by the sale of the hypothecated property. This suit was dismissed on the ground that the deed of sale, not being registered, could not be received in evidence, and consequently *I's* right to sue on such bond failed. *I* having procured the execution of a fresh deed of sale and caused it to be registered, brought a second suit on such bond by virtue of such deed of sale, claiming as before. *Held* that the second suit was not barred by the provisions of s. 13 of Act X of 1877.

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THE plaintiff in this suit sued for Rs. 153-12-0, principal and interest, on a mortgage-bond (*disht-bandhak*), bearing date the 25th May 1874, claiming to recover such money by the sale of the land and other property hypothecated in such bond. This mortgage-bond had been executed by the defendants in favour of one Ram Charan. After the death of Ram Charan his heirs, his widow Parbati, and his nephew, conveyed their rights and interests under this mortgage and under other mortgages to the plaintiff, for Rs. 150, the deed of sale being dated the 13th March 1878. This deed was not registered. The plaintiff, by virtue thereof, sued the defendants upon the mortgage-bond of the 25th May 1874, claiming to recover Rs. 146 thereunder by the sale of the hypothecated property. This suit was dismissed on the 20th May 1878, on the ground that the deed of sale, not being registered, could not be received in evidence, and the suit was consequently not maintainable. On the 8th November 1878, the heirs of Ram Charan executed a second deed of sale in favour of the plaintiff, in which they again transferred to him their rights and interests under the mortgage-bond of the 25th May 1874, and the other mortgages, the consideration-money purporting to be Rs. 150. This deed of sale was duly registered. The plaintiff brought the present suit on the mortgage-bond of the 25th May 1874, by virtue of this second deed of sale. The Court of first instance held that the present suit was barred by the provisions of s. 13, Act X of 1877, its reasons for so holding being as follows:—
 “In my opinion, the case is liable to be dismissed on the ground that, when the plaintiff’s claim for the very debt has once been dismissed, he cannot sue again for that very debt, no matter on what grounds that case was dismissed: in other words, the plaintiff’s claim is, in my opinion, barred by s. 13, Act X of 1877: in the former case the plaintiff had claimed this very debt, basing his right on a sale-deed executed by the same person by whom the present sale-deed has been executed: the present debt and the plaintiff’s right on the

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sale-deed formed the subject of the former suit, and the same things form the subject of the present suit also: hence, under s. 13, Act X of 1877, the present claim will not lie: it is true that the plaintiff's first claim was dismissed because the plaintiff's sale-deed was not registered; still his claim to recover the money was dismissed along with it, and he has no right to bring a claim on the basis of a second sale-deed." On appeal by the plaintiff the lower appellate Court was also of opinion that the suit was not maintainable, holding that nothing passed to the plaintiff under the second sale, and that, if anything passed, the suit was barred by the provisions of s. 13 of Act X of 1877. The reasons of the lower appellate Court for so holding were as follows:—"The mortgage rights were sold to the plaintiff on the 13th March 1878, and the purchase-money was paid to Parbati: from and after that date she ceased to have any interest in the mortgage: she had sold her rights and been paid for them: after the sale she could not have sued the mortgagors for the mortgage-money as she had no mortgage rights, and for the same reason she had no right to sell in November 1878: the deed of sale she executed was so much waste paper, purporting as it did to transfer rights which Parbati had not to transfer, as she had parted with them in March of the same year: if the second sale-deed was to remedy the defect of the first one, then the suit is barred under s. 13: if the second sale-deed is an entirely separate transaction, then the defendants' contention that no suit will lie on it is right, for the rights the subject of the sale were not Parbati's to transfer: the appellant urges that the sale-deed shows that, after the first suit was dismissed, the plaintiff demanded back his money from Parbati, and that the second sale deed was executed in lieu of retaining the money: on this the Court has simply to observe that the first sale was a *bona fide* one: the effect of the Subordinate Judge's decision dismissing the suit based on it was not to cancel the deed of sale or invalidate it, the sale having taken place, but that the deed could not be produced in Court as it had not been registered: he could plaintiff's business to see that the deed was registered: he could not enforce his demand for a refund of his money by Parbati by suit, for he could not say that the sale had been carried out, and it was his fault that he did not register the deed or cause its regis-

tration, without which he could not make it the basis of suit in a Civil Court: the respondents' (defendants') objection therefore that the suit will not lie on the present sale-deed is good."

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LAL.

The plaintiff appealed to the High Court, contending in the memorandum of appeal that the present suit was not barred by the provisions of s. 13, Act X of 1877, as the matters in issue in the former suit had not been determined, and the causes of action in the two suits were distinct; and that there was no reason in law or equity why the present suit instituted on the basis of a valid and registered deed should not be tried and determined.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad* for the appellant.

Pandit Bishambhar Nath, *Pandit Ajudhia Nath*, and *Lala Lalla Prasad* for the respondents.

The Court (STUART, C.J., and OLDFIELD, J.) made the following

ORDER OF REMAND.—The defendant executed a deed of mortgage in favour of one Ram Charan on 25th November 1874, and the latter's widow assigned the rights of the mortgagee to plaintiff by deed of sale dated 13th March 1878. The plaintiff then brought a suit against defendant to recover on the bond. The suit was dismissed on the ground that the deed of sale in plaintiff's favour, being unregistered, was inadmissible in evidence, and in consequence his title to sue on the bond failed. Plaintiff then got his vendors to execute a fresh deed of sale in his favour, and he has brought the present suit against defendant to recover on the bond. The Judge has dismissed the suit on grounds which appear to us to be erroneous. He seems to hold that the present suit is barred by s. 13, Act X of 1877, and, if not, that the second deed of sale could convey no title, since all the interest which the vendor had had already been conveyed to plaintiff by the first deed. But s. 13, Act X of 1877, cannot apply, since the two suits have not been brought under the same title. The title of plaintiff is in this suit based on a deed of sale subsequent to the disposal of the former suit, and it cannot be held that the second deed conveyed no interest to the

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plaintiff by reason of the vendor having already parted with his interest by the previous sale-deed, since the latter deed, being unregistered, could not affect the property. In fact, the first suit came to nothing, the whole record disappearing and leaving nothing on which a plea of *res judicata* or any other plea could be based. We therefore reverse the decree of the lower appellate Court and remand the case to that Court to try the issue as to the amount due to plaintiff. On submission of the finding, ten days will be allowed for objections.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson.

1880
 November 27.

EMPRESS OF INDIA *v.* BHAIRON SINGH AND OTHERS.

Confession—Act I of 1872 (Evidence Act), s. 24—Act X of 1872 (Criminal Procedure Code), ss. 122, 346.

A confession does not become irrelevant merely because the memorandum required by law to be attached thereto by the Magistrate taking it has not been written in the exact form prescribed.

THIS was an appeal by six persons convicted on a trial held by Mr. J. H. Prinsep, Sessions Judge of Cawnpore. It appeared that four of the convicted persons had made confessions to Chohari Prasad, the Magistrate who had been deputed to make a preliminary inquiry into the case, which were recorded and attested by the Magistrate's signature. A certificate was appended to each of such confessions to the effect that the statement had been taken in the presence and hearing of the accused person, and, having been read to him, was verified by him, and such certificate was signed by the Magistrate. These confessions were forwarded by Chohari Prasad to Sanaulah Khan, the Magistrate who inquired into and committed the case for trial. The same four persons also made confessions before the committing Magistrate. These confessions were recorded by him on the 19th May 1880, under his own hand, and were signed by him. On the 10th June 1880, such persons having been asked whether they wished any witnesses to be summoned to give evidence before the Court of Session, their answers were recorded after their confessions, and after their answers a certificate was appended signed by the Magistrate to the effect that their answer

were taken down in his presence and what was stated therein was right and correct.

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It was contended before the High Court that the confessions, not having been recorded according to law, were not admissible in evidence.

Munshi *Kashi Prasad* for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) for the Crown.

PEARSON, J.—The disregard by the native Magistrates Chohari Prasad and Sana-ul-lah of the provisions of ss. 122 and 346 of the Procedure Code is highly reprehensible, and the District Magistrate must be directed to take care that in future those provisions of the law be strictly observed by the Magistrates subordinate to him. But it does not follow that the confessions made before the above-named Magistrate in this case cannot be taken into consideration merely because the memoranda required by law to be attached thereto have not been written in the exact form prescribed. S. 24 of the Indian Evidence Act is the law by which we must be guided in this matter. I see no sufficient reason to believe that the confessions were “caused by any inducement, threat, or promise, having reference to the charge against the accused persons proceeding from a person in authority and sufficient to give the accused persons grounds, which would appear to them reasonable, for supposing that, by making the same, they would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against them.” Two of the confessing prisoners stated, it is true, in the Sessions Court that they had been maltreated by the police, but they offered no proof of their statements, and never alleged anything of the kind before the native Magistrates. The prisoner Gahbar Singh, who is one of the two who pretend to have been maltreated, is not one of the appellants. The other is Patti Singh, whose confession like that of Debi Din, amounts to a confession of abetment only. I am of opinion that those two prisoners should have been convicted of abetment only of the attempt made to murder Gopal Singh. Indeed, the prisoners Gahbar Singh, Muru Singh, Himmat Singh, Jodha Singh, and Narain Singh, seem to

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have been guilty of no more than abetment of the attempt actually made by Bhairon Singh. But they cannot claim on this account any modification of the punishment awarded to them. It is admitted by the pleader for the appellants that, if the confessions made before the Native Magistrates be taken into consideration, the convictions cannot be successfully impugned. Those confessions, as I have already intimated, cannot be held to be irrelevant under the law of evidence, and are accepted by me as having been voluntarily made. The appeal is therefore dismissed.

Appeal dismissed.

CIVIL JURISDICTION.

1880
 November 30.

Before Mr. Justice Spankie and Mr. Justice Straight.

BANSI DHAR (PLAINTIFF) v. HAR SAHAI AND ANOTHER (DEFENDANTS).*

Registered bond payable on demand—Limitation—Act XIV of 1859 (Limitation Act)—Act IX of 1871 (Limitation Act)—Act XV of 1877 (Limitation Act).

The cause of action in a suit on a registered bond payable on demand, bearing date the 2nd March 1870, was alleged to have arisen on the 5th January 1879, the date of demand. Under Act XIV of 1859 the limitation for such a suit was six years computed from the date of the bond. Before that period expired Act IX of 1871 came into force, which provided a limitation for such a suit of three years computed from the date of demand. *Held* that, as the cause of action and the institution of such suit occurred after the repeal of Act IX of 1871, the provisions of that Act were not applicable, and accordingly, whether Act XIV of 1859 or Act XV of 1877 governed such suit, it was barred, as, in either case, limitation began to run from the date of such bond.

THE plaintiff sued on a registered bond, bearing date the 2nd March 1870, for Rs. 399-4-0, principal and interest, the suit being instituted after Act XV of 1877 came into force. The amount of his bond was payable on demand. The plaintiff stated in his plaint that the cause of action arose on the 5th January 1879, the date of demand. The defendants set up as a defence to the suit that it was barred by limitation, inasmuch as the provisions of Act XIV of 1859 were applicable, the bond having been executed when that

* Application, No. 73B. of 1880, for the revision under s. 622 of Act X of 1877 of an order of Maulvi Maksud Ali Khan, Subordinate Judge of Moradabad, dated the 15th April 1880.

ERRATUM.

Page 251, third line from bottom, *for* "Sessions Judge of Bijnor, Budaun division," *read* "Sessions Judge of Bijnor."

Act was in force, and under that Act the period of limitation began to run from the date when the bond was executed, and the suit had not been brought within six years from that date. The Court of first instance held that the provisions of Act IX of 1871 were applicable, inasmuch as, when that Act was passed, the period of limitation provided for the suit by Act XIV of 1859 had not expired, and the suit having been brought within three years from the date of demand was within time. On appeal by the defendant, the lower appellate Court held that the provisions of Act XV of 1877 were applicable, and limitation should be computed from the date of the bond, and the suit not having been brought within six years from that date was barred by limitation.

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The plaintiff applied to the High Court, under s. 622 of Act X of 1877, to revise the lower appellate Court's ruling, contending that the suit was within time.

Munshi *Hanuman Prasad* for the plaintiff.

Pandit *Bi-hambhar Nath* and Mir *Zahur Husain* for the defendants.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The registered bond in suit was executed on the 2nd day of March 1870. At that time Act XIV of 1859 was in force, and limitation ran from the date of the execution of the instrument, the period being six years. Before that period had expired, however, Act IX of 1871 came into operation, and according to its provisions the limitation applicable to such a document was altered to three years from the date of demand, and consequently the obligees of bonds had it in their own hands, so to speak, to fix the limitation by which they would be governed. The plaintiff in the present suit alleges that he made his demand on 5th January 1879, long after Act XV of 1877 had come into operation. The cause of action and the institution of the suit having occurred after the repeal of Act IX of 1871, it does not appear to us that the provisions of that Act can have any application to the present

1880 case. Accordingly, whether Act XIV of 1859 or Act XV of 1877
 BANSI DHAR governs the suit, it is barred, as in either case the limitation period
 v. would run from the date of the execution of the bond. The decision
 HAR SAHAL. of the Subordinate Judge is therefore correct, and this application
 must be rejected with costs.

Application rejected.

1880
 December 7.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA *v.* McLEOD AND ANOTHER.

Defamation—Publication—Act XLV of 1860 (Penal Code), s. 499.

M, a medical man, and editor of a medical journal published monthly, said in such journal of an advertisement published by *H*, another medical man, in which *H* solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed,—“The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officer serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional.” *Held* that, inasmuch as such advertisement had the effect of making such hospital a “public question,” and of submitting it to the “judgment of the public,” and *M* had expressed himself in good faith, *M* was within the *Third* and *Sixth Exceptions*, respectively, to s. 499 of the Penal Code. *Held* also that *M* came within the *Ninth Exception* to that section.

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is a publication of such defamatory matter at Allahabad.

The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not.

THIS was an appeal to the High Court by Surgeon-Major K McLeod and Mr. F. F. Wyman convicted by Mr. A. M. Markham, Magistrate of the Allahabad district, by an order dated the 21st September 1880, of defamation. The facts of the case are sufficiently stated in the judgment of the High Court.

Mr. Colvin for the appellants.

Mr. Spankie and the Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

The following judgment was delivered by the Court:—

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STUART, C.J.—This is an appeal from a conviction by the Magistrate of Allahabad for the offence of defamation under s. 499 of the Indian Penal Code with its “*Explanations*” and “*Exceptions*.” The facts which gave rise to the prosecution are these:—In the *Indian Herald*, a newspaper published at Allahabad, of the 29th January of this year, there appeared an advertisement headed “Allahabad Eye Hospital,” setting forth the number of patients who had been treated in it, the number of operations, and generally the success of the institution, and inviting subscriptions, which the advertisement stated “will be thankfully received by Dr. Geoffrey C. Hall, Central Prison, Allahabad (1).” This advertisement, it was explained at the hearing, had since been repeatedly published in the same newspaper. It is not disputed that it was inserted by Dr. Hall himself, and that it referred to his own Eye Hospital in the city of Allahabad, that is to say, that he made himself responsible for it by accepting and consenting to its insertion in the *Indian Herald*; for in his re-examination by Mr. Spankie, one of the counsel for the prosecution, Dr. Hall states:—“I did not draw out that advertisement myself: the editor of the *Indian Herald*, Mr. Crawford, drew it up: it was inserted gratis: I did not see the advertisement before it appeared in the paper.” It does not appear from the record that any particular notice was taken of this advertisement by any publication, professional or lay, till the publication of the *Indian Medical Gazette* of the 1st July of this year. This is a monthly medical journal published at Calcutta, and bearing on its front or title page to be “Edited by K. McLeod, M.D.,” who is a defendant in the present case, and there is evidence to prove that the other defendant, Mr. Wyman, is the publisher of the

(1) The advertisement was in the following terms:—

“ALLAHABAD EYE HOSPITAL.—Subscriptions are urgently needed for this institution, which has now been opened for little over a year, during which time 1,100 patients have attended suffering from various diseases of the eye. There have been 180 major operations, including 95 cataract operations, 31 iridectomies; with one exception, these all have been successful. The Municipality for the last few months have given a grant of Rs 50 a month, the remainder being paid by the surgeon in charge. The cost of the institution averages Rs. 90 a month, exclusive of cost of instruments, &c.; diet for in-patients, of whom there are at present nine, there being accommodation for 16, costing on an average 2 annas a day each. Subscriptions will be thankfully received by Dr. Geoffrey C. Hall, Central Prison, Allahabad.”

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same journal. In this *Indian Medical Gazette* then of the 1st July 1880, there appeared, under the heading of "Current Medical Topics," the following short article:—"Our attention has been drawn to the fact that a medical officer, serving in a large town in the North-Western Provinces, is in the habit of soliciting, by advertisement, subscriptions to an Eye Hospital which he has established. The medical transactions of the institution are set forth in the advertisement. 'There have been 180 major operations, including 95 cataract operations, 31 iridectomies; with one exception these have all been successful.' The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officer serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional." This appears to have caught the eye of one of Dr. Hall's medical friends here, who takes the *Gazette*, and that gentleman at once showed it to the prosecutor, who forthwith, and without any previous communication with the defendants, or either of them, instituted this prosecution, explaining that he adopted this course by legal advice.

The charge against the defendants is that of defamation or libel under s. 499 of the Indian Penal Code, by reasons of the article in the *Indian Medical Gazette* imputing to Dr. Hall or suggesting untruthfulness on his part in the advertisement referred to, and also for accusing him of unprofessional conduct by the publication of such an advertisement. After a trial, which I feel bound to say was patient and fair on the part of the Magistrate, the two defendants were convicted; Dr. McLeod being sentenced to pay a fine of Rs. 300, or in default to suffer simple imprisonment for one month, and Mr. Wyman, the publisher, to pay a fine of Rs. 150, or in default to suffer simple imprisonment for 14 days. It was further ordered by the Magistrate, under s. 308, Criminal Procedure Code, and subject to an appeal, if any be instituted, that the expenses of the prosecution properly incurred should be paid out of the fines if paid or levied.

Against this conviction, and the sentences, an appeal has been preferred to this Court, and has been argued before me by the counsel for both parties. The pleas taken by the defendants-appellants are that the article complained of was not defamatory, but was a fair criticism on Dr. Hall's advertisement, and that it falls within the scope of *Exceptions* 1, 3, 6, and 9 to s. 499, Indian Penal Code. It is also pleaded that it is not proved that the appellants either made, printed or published, the alleged defamatory matter; and it is further objected that the Magistrate of Allahabad had no jurisdiction to try the defendants-appellants for the alleged offence. These two last pleas had better be disposed of first.

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On the publication of the alleged libel or defamation there can be no doubt. The evidence of Dr. Deakin, who takes the *Indian Medical Gazette*, and who called Dr. Hall's attention to the article complained of, is sufficient to prove publication in Allahabad, for it was laid down so far back as at the State Trials that, "if a man write a libel in London and send it by post addressed to a person at Exeter, he is guilty of a publication in Exeter."—(12 St. Tr. 322.) Mr. Wyman in particular repudiated, and no doubt truly, any knowledge of the inculcated article, but I must tell him and all in the same position that he is not thereby excused, but as publisher must, under all circumstances, answer for the libel imputed to his journal. For it has been laid down (Folkard, 4th ed., 1876, page 425) that "the wilful and intentional delivery of a libel by way of sale or otherwise, as by a book-seller or hawkers, is a sufficient publication, though the parties so publishing did not know the contents." And further that "it is not material whether the person who disperses libels is acquainted with their contents or otherwise, for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing of the purport of them from an illiterate publisher would make him safe in dispersing them." And the law so laid down is all the stronger against Mr. Wyman, seeing that he cannot be called illiterate, but is well known to be a very intelligent gentleman. But the evidence identifying the defendants as editor and publisher is not so clear perhaps as it should have been in a criminal prosecution.

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No such objection, however, appears to have been taken before the Magistrate, and indeed at the hearing before myself I did not understand it to be disputed that the Dr. McLeod who is described as the editor on the face of the *Indian Medical Gazette* itself was as such the proper defendant to answer for the alleged defamation. Nor as to the defendant Wyman was it disputed that he is the publisher of the same *Indian Medical Gazette*. And both defendants have filed a power of attorney duly executed by them in favour of Messrs. Roberts, Morgan & Co., a firm of solicitors in Calcutta, by which these gentlemen are empowered "to appear in the Court of the Magistracy of Allahabad, or any other Court having jurisdiction in the matter, in certain proceedings instituted against us or one of us at the instance of Surgeon G. C. Hall, on a certain charge defined in s. 499 of the Indian Penal Code, and to take such steps and proceedings as may be necessary for defending the said charge and proceedings, or any further charges or other proceedings that may be brought against us or either of us of any nature or kind soever by the said G. C. Hall, and for that purpose to make, sign, verify, and present all necessary petitions, written statements and other documents, and to nominate and appoint or retain counsel, vakils, and other persons." It is not pretended or in any way even suggested that the K. A. McLeod and F. F. Wyman, who have signed this power of attorney, are not the identical persons of these names who are respectively editor and publisher of a journal called the *Indian Medical Gazette*, nor that the *Indian Medical Gazette* complained of in this case is the same *Indian Medical Gazette* that is conducted by these defendants. Moreover, it is very plain from the record that the defence in this case proceeds clearly and unmistakably on the assumption, I had almost said the confession, or what is tantamount to it, that there was no want of identity, and that the defendants, who by their counsel pleaded and argued on the merits before the Magistrate, were the persons truly responsible to the prosecutor for the matter of his complaint. I am therefore of opinion that the alleged defamatory article was legally published within the district of Allahabad, and that the defendants Dr. McLeod and F. F. Wyman were the persons legally responsible for such publication. Under these circumstances the Magis-

trate of Allahabad had undoubtedly jurisdiction to entertain and try the case, and the appellants' pleas to the contrary must be disallowed.

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I have thought it necessary to say so much on these two points of publication and identity, although the conclusion I have expressed respecting them is of the less consequence, seeing that, on the merits of the case, I have formed the opinion very clearly that the article complained of in the *Indian Medical Gazette* is not defamatory within the meaning of the Indian Penal Code.

I have in the first place to observe that the medical evidence appears exclusively to relate to the question whether the advertisement was unprofessional, or, as one of the medical witnesses puts it, is against professional etiquette. This evidence is of a very partial kind and merely evidence of opinion, and, if I may be allowed the remark, it might be suggestive to some minds of the traditional jealousy supposed to be peculiar to the medical profession since the days of Hippocrates. Two of the doctors examined express the opinion, one of them Dr. Deakin who first brought the article to the notice of the prosecutor and must be understood as one of his own witnesses, that the advertisement was not unprofessional. But so far as the medical evidence goes, the weight of it is certainly, in my judgment, favourable to the contention of the defendants, and almost justifies the libel, if libel it was, for it undoubtedly supports the view expressed in the article that the advertisement was unprofessional, and the force of this evidence is not in the least affected by the remark of the Magistrate that "the stigma of unprofessional conduct (in the article) is plain and uncompromising." The question, however, which the Magistrate had to try was not whether the advertisement was liable to the charge of being merely unprofessional, but whether the defendants had incurred the penalties of the criminal law for saying so. That was the question, and the only question, before the Magistrate, and he has very unnecessarily incumbered the record with medical depositions and medical opinions, which, to say the least, do not certainly dispose of the question of defamation. For myself, I am far from approving of the article, and I differ in opinion from the writer of it. I think it shows bad taste on the part of its

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author, and that to some extent it casts an unmerited slur on the prosecutor and does him injustice. I consider that Dr. Hall was quite entitled to advertise the claims of the Hospital as a public institution. All the medical witnesses say so, even those whose evidence is adverse to him, and if that be so, he was not only entitled but bound to show on the face of the advertisement itself that he was justified in appealing to the public for pecuniary help, and he could only do that by giving the particulars which the advertisement contained. Dr. Hall, however, could have very well afforded to have disregarded the unmerited attack, as perhaps it may be called. He is a gentleman well known and highly respected in these provinces for his many good qualities, and for his professional knowledge and skill, and I know of no officer of Government more worthy of esteem. But this is a criminal case, and what I have to consider is not merely its moral or social aspect, but whether by sneering or appearing to sneer at the facts stated in the advertisement, and calling Dr. Hall's conduct unprofessional, the defendants thereby brought themselves within the provisions of s. 499 of the Indian Penal Code.

It is in the first place to be observed that the article itself is not in terms altogether gratuitous. It refers to Dr. Hall's advertisement by which we are enabled to understand the nature and extent of the prosecutor's alleged misconduct; so that, if we have the bane, we have with it also the antidote, and the one document is the measure of the meaning and of the *animus* of the other, and the public to whom both documents were addressed are as well able to judge of the imputation on Dr. Hall as any body of, or number of, doctors can be. Nor is the article so very bad as some of the medical witnesses seem to think it. The word "marvellous" in it indeed is not used in a friendly, but rather perhaps in somewhat spiteful, sense. That, however, is not *necessarily* the meaning of the writer. He may possibly have been sincere in describing Dr. Hall's success as marvellous, and, in fact, unless he was so, it is not easy to understand why he should have stigmatized the advertisement as unprofessional. No personal motive, however, is apparent on the face of the article itself, and there is ample evidence to prove the absence of any such feeling

on the part of the defendants towards Dr. Hall; and if, notwithstanding the conductors of the *Indian Medical Gazette* were of opinion that, in issuing the advertisement, which had been before the public since January last, and remained unnoticed by the defendants till the following July, Dr. Hall, as a professional man, had acted in a manner of which the defendants did not approve (for such appears to me to be the full extent of the meaning of the word "unprofessional"), the printing and publishing of such an opinion might not be in good taste, and might even be reprehensible, but to say that the editor and publisher thereby made themselves amenable to the criminal charge of defamation is to put a construction on s. 499, Indian Penal Code, which I cannot accept.

The provisions of the Indian Penal Code for the offence of defamation are contained in chapter XXI and s. 499 with its "*Exceptions*" and "*Explanations*" constitute nearly the whole of the chapter, there being only three other short sections in it, 500, 501, and 502, which provide for the punishment on conviction of the offence. It will be seen from these provisions of this part of the Penal Code that the framers of this part of the Code were careful to draw the line, so as not by their enactments unduly or unreasonably to interfere with legitimate liberty in speech and writing, especially in an Empire in which the Press is free, absolutely free, to the full extent of a living reality. And that being so, it is not difficult to understand what was intended by this important section of the Indian Penal Code. It begins by providing that "whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Now if the article complained of by the prosecutor had been based on a different and less open allusion than it was to its motive, there might have been some cogency in the argument that Dr. Hall had been defamed by the defendants. If, for instance, the article, instead of referring to an advertisement, which had been before the public for the very considerable period

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1880 - of seven months ere it provoked any unfavourable notice, had
 EMPRESS OF been called forth in the mind of the writer by secret information
 INDIA maliciously communicated, the words I have quoted from s. 499,
 v. taken in connection especially with the proviso in *Explanation 4*
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 in respect of "his calling," would have applied, and the complicity
 of the defendant might have been very serious. But here the
 facts are of a different character,—the alleged defamation simply
 being a remark of a very doubtful nature respecting the prose-
 cutor's veracity, with the expression of an opinion that his conduct
 in publishing the advertisement which appeared in the *Indian*
Herald was unprofessional; and, if this was done in good faith (and
 I see no reason to doubt that it was), then the article comes within
 the terms of the 3rd *Exception* in s. 499, by which it is provided
 that: "It is not defamation to express in good faith any opinion
 whatever respecting the conduct of any person touching any public
 question, and respecting his character, so far as his character
 appears in that conduct, and no further." For here the advertise-
 ment had clearly made the prosecutor's Eye Hospital a "public
 question"; and it further had the effect of submitting the Hospital
 to "the judgment of the public" within the meaning of the *Expla-*
nation to the 6th *Exception*; and I think it is also rightly con-
 tended by the defendants that their conduct in publishing the
 article is protected by the 9th *Exception* in s. 499, which states that:
 "It is not defamation to make an imputation on the character of
 another provided that the imputation be made in good faith for the
 protection of the interests of the person making it, or of any other
 person, or for the public good." That such was the position of
 the defendants in relation to the prosecutor's advertisement of his
 Hospital will appear from those portions of the evidence which are
 material to the only question in the case, and that is, as I have
 before said, not whether Dr. Hall's conduct was, under the cir-
 cumstances, unprofessional, but whether the defendants were cri-
 minally responsible for saying so. And of such evidence the most
 instructive is that of the prosecutor himself. He tells us at once
 that his object was a public one. He says: "I thought that a
 Hospital might advantageously be established in Allahabad for the

North-Western Provinces: about six months after the Hospital had been established the Inspector-General of Hospitals came to see it with a view to its being taken over by Government." It is very intelligible that his counsel, seeing the bearing of such statements, endeavoured to exclude them. The Magistrate, however, very properly ruled that they were relevant. Then in his cross examination Dr. Hall states that he had contributed articles to the same *Indian Medical Gazette*, which was said to have defamed him, adding: "I have never in my opinion been treated otherwise than with courtesy by the editor of the *Indian Medical Gazette* save in this instance." And he makes a statement which is quite inconsistent with the idea of any bad feeling or of any personal motive against him; for he deposes: "I am the author of a pamphlet on the causes of blindness in India: it was reviewed in the *Indian Medical Gazette*, favourably reviewed"; and again—"I have had no previous reason for supposing that the editor of the *Indian Medical Gazette* entertained any motive against me, nor had I in regard to Mr. Wyman, the publisher." He goes on to say that his object in publishing the advertisement was not to promote his own professional success, but simply to gain subscriptions for his hospital, which, he says, he considered a very useful institution, "and I wished to bring it before the public, and invited support: I wanted to awaken the public interest in the institution." Clearer evidence than this there could not be that the advertisement related to a matter not private or personal, but public, and that therefore the defendants, by their article, had not defamed the prosecutor within the true meaning of s. 499. Respecting his own position in the matter, however, in other respects, there appears to have been some confusion of mind on the part of the prosecutor when giving his evidence. He explains that by the expression in the advertisement, "the surgeon in charge," he meant himself, and he makes the admission: "I think that this was advertising the charity of the surgeon in charge: those who knew that I was the surgeon in charge might think that I was advertising my own charity,"—thus clearly challenging discussion of the question as to whether his conduct in publishing the advertisement was or was not unprofessional, and the defendants may therefore simply be said to have accepted the challenge. He adds: "I do not think that the tendency of the adver-

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tisement was to advertise the success and the charity of the surgeon in charge," although he admits that "that construction might certainly be put upon it." The evidence of the prosecutor further appears to be replete with statements going, if not to provoke, at least to justify and excuse, the defendants' article. He says: "Successful hospital work leads to reputation, and sometimes to promotion: reputation and promotion are material advantages: people might have thought that the surgeon in charge was advertising what might procure him reputation and promotion: I certainly think the advertisement was misinterpreted and misunderstood by the editor of the *Indian Medical Gazette*: it was an advertisement liable to misinterpretation and misunderstanding; and he makes the rather startling admission, "I do not think that it would be professional knowingly to insert in a newspaper an advertisement liable to misinterpretation," although he had just informed the Court that the advertisement was liable to misinterpretation and misunderstanding. The prosecutor concludes his evidence as follows: "I did not see the advertisement before it appeared in the paper: the hospital was originally instituted by me at my own expense: it gradually involved me month by month in further expenses: I am not a rich man: I was not prepared to carry on the undertaking regardless of personal expense: I think the hospital is one which should be supported by public and not by private expense: my object in stating in the advertisement that the expenses were borne in part by the surgeon in charge was to show the public that a private person was bearing part of the expenses, and to relieve myself: I do not know of any institution in England which was started by private means and afterwards taken up by public funds: I have no doubt there are such: I did not think the advertisement, when I read it in print, was unprofessional." Now really it appears to me impossible to read this evidence without seeing that it plainly proves all the circumstances of exemption from liability on the part of the defendants under s. 499 of the Indian Penal Code. It also goes to excuse the defendants, even if they had more plainly and distinctly than they have done, contravened the law. I have already adverted to the evidence of the other doctors, and for the reasons which I have already explained it is not conclusively revelant to

the issue before the Magistrate, that being, not whether Dr. Hall's advertisement was unprofessional, but whether the defendants had made themselves amenable to the criminal law of defamation for simply expressing the opinion in their journal that it was. The prosecution has utterly failed, and it is very much to be regretted that it was ever undertaken. Dr. Hall's character as a gentleman and his reputation as a medical man did not require such an ordeal, and as regards the defendants' conduct, if made the subject of legal complaint at all, that might have been more appropriately considered by a Civil Court, for although the remedies in cases of libel by civil suit and criminal prosecution are co-extensive, the wrong complained of in this case could have been sufficiently and indeed more satisfactorily inquired into in a Civil Court than in the Court of the Magistrate. At the same time I by no means desire to be understood as saying or suggesting that if the prosecutor had been plaintiff in a Civil Court, he would have had a better chance of success than he has had in these proceedings. I am very clearly of opinion that the convictions before me in this appeal cannot stand, but must be, and they are, set aside, the sentences are quashed, and the fines imposed on the defendants are remitted.

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APPELLATE CIVIL.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

TALEMAND SINGH (DEFENDANT) v. RUKMINA (PLAINTIFF).*

Joint Hindu Family—Widow's Right of residence on Family Dwelling-house—Auction-purchaser.

The widow of a member of a joint Hindu family can claim a right of residence in the family dwelling-house, and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. *Gauri v. Chandramani* and *Mangala Debi v. Dinanath Bose* (2) followed.

THE plaintiff in this suit, Rukmina, claimed to be maintained in possession of a certain house, basing her suit on her right to

* Second Appeal, No. 631 of 1880, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 28th February 1880, modifying a decree of Mirza Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 12th December 1879.

(1) I. L. R., 1 All., 262.

(2) 4 B. L. R., O. C., 72.

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reside therein as heir to her deceased husband. It appeared that this house was the joint undivided property in equal moieties of the plaintiff's deceased husband and his first cousin, Jaipal. The plaintiff, on her husband's death, sold the house to one Gobind, whereupon Jaipal sued her and the purchaser to be maintained in possession of the house and to have that sale set aside. On the 29th August 1873, Jaipal obtained a decree in that suit. On the 8th December 1874, Jaipal gave the defendant in the present suit a bond in which he hypothecated the house as collateral security for the payment of certain moneys which he had borrowed from him. Subsequently the plaintiff sued Jaipal for maintenance, claiming Rs. 72 as her allowance from the 29th August 1873 to the 24th February 1875, at the rate of Rs. 4 per mensem. This suit was adjusted, it being agreed between the parties, under a compromise dated the 4th September 1875, *inter alia*, that the plaintiff should be entitled to reside in the house so long as she lived, and Jaipal should make her an allowance of one rupee per mensem for her maintenance for her life. Subsequently the defendant in the present suit brought a suit on the bond given him by Jaipal, in which suit he obtained, it appeared, only a money-decree, and not a decree enforcing the hypothecation of the house. He caused the house to be put up for sale in execution of this decree, and purchased it himself. The plaintiff in the present suit resisted his obtaining possession of the house, and in the proceedings which arose out of such resistance an order was made against her. She accordingly brought the present suit. The defendant set up as a defence to the suit that his judgment-debtor, Jaipal, "had, prior to the compromise dated the 4th September 1875, mortgaged the house in question to him, and it was in satisfaction of the mortgage-debt that the house was attached and sold, and that, the decree and the compromise having been made after his bond was executed, must be regarded as intended to defeat his right, and were collusive." Upon the issue, how does the compromise affect this suit, the Court of first instance held as follows:—"The Court holds that the compromise dated the 4th September 1875, executed by the debtor, whereby he agreed to the residence of the plaintiff, is valid, seeing that, at the time of its execution, Jaipal, debtor, was possessed of proprietary rights: the plaintiff on its basis has certainly a right of resi-

dence according to the scope of the ruling in *Gauri v. Chandramani* (1): the auction-purchaser cannot oust her during her lifetime, she having only a right of residence in the house: even if Jaipal became proprietor of the property left by Gopal, the husband of the plaintiff, he cannot deprive her of this right, and she will live in the same way as a lessee in the house, the defendant receiving rent at the rate of one rupee or any sum that a tenant should pay: the evidence produced by the defendant himself shows that Jaipal became owner of the house, having inherited it from Gopal, the husband of the plaintiff: it was not his (Jaipal's) own property." The Court of first instance accordingly gave the plaintiff a decree "for maintenance of possession of the house in question, by right of residence during her lifetime." On appeal by the defendant the lower appellate Court held that the plaintiff was only entitled to a decree in respect of a moiety of the house, one moiety only thereof having been the property of her deceased husband, the other moiety having belonged to Jaipal; and modified the decree of the Court of first instance accordingly.

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The defendant appealed to the High Court contending that the plaintiff's claim could not be maintained after the house had been sold in execution of a decree against Jaipal.

Maulvi *Obaidul Rahman* for the appellant.

Munshi *Hanuman Prasad* for the respondent.

The judgment of the Court (STUART, C.J., and OLDFIELD, J.) was delivered by

OLDFIELD, J. — We are of opinion that the Courts have rightly held that the plaintiff, a widow of a member of a joint Hindu family, can claim a right of residence in the family dwelling-house and can assert it against the auction-purchaser. The ruling is in accordance with the decision of this Court in *Gauri v. Chandramani* (1) and of the Calcutta Court in *Mangala D bi v. Dinanath Bose* (2), and with the authorities referred to in West and Bühler's Hindu law. We dismiss the appeal with costs

Appeal dismissed.

(1) I. L. R., 1 All., 262.

(2) 4 B. L. R., O. C., 72.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

1880
December 20.

CHUNNI LAL AND OTHERS (JUDGMENT-DEBTORS) v. DEBI PRASAD AND
ANOTHER (AUCTION-PURCHASERS).*

Sale in Execution of Decrees of several Courts—Act X of 1877 (Civil Procedure Code), ss. 285, 311, 312.

Certain immoveable property was attached in execution of a decree made by a Subordinate Judge and also in execution of a decree made by a Munsif. These decrees were held by the same person and the judgment-debtor was the same person. Such property was sold in execution of both decrees. On the application of the judgment-debtor, who brought into court the amount due on the decree made by the Subordinate Judge, and with the consent of the decree-holder and the auction-purchaser, the Subordinate Judge made an illegal order setting aside such sale. Subsequently, on the application of the decree-holder and the auction-purchaser, the Munsif made an order confirming such sale.

Per SPANKIE, J.—That the Subordinate Judge had not any jurisdiction under s. 285 of the Civil Procedure Code to deal with such sale as regards the decree made by the Munsif, and the Munsif was not precluded by that section from confirming such sale as regards the decree made by him by reason that the Subordinate Judge, a Court of a higher grade, had made an order setting it aside.

Per OLDFIELD, J.—That having regard to the provisions of that section, it was doubtful whether the Munsif was competent to confirm such sale; but, inasmuch as the Subordinate Judge only intended to set it aside as regards the decree made by him, and his order was illegal, and the Munsif's order had done substantial justice, there was no reason to interfere.

ON the 20th May 1879, certain immoveable property was put up for sale in execution of two decrees. The holder of these decrees was the same person, and the judgment-debtors were the same. One of these decrees was made by the Subordinate Judge of Sháhjahánpur, and the other by the Munsif of East Budaun, Sháhjahánpur district. The property realized Rs. 1,350, and that amount was duly deposited by the auction-purchaser. The judgment-debtors applied to the Subordinate Judge to set aside the sale on the ground of irregularities in its conduct. They did not in this application make any reference to the decree made by the Munsif; nor did they then or at any time subsequently apply to the Munsif to have the sale set aside as regards the decree made by him. The judgment-debtors did not press the objections to the conduct of the sale which they had taken before the Subordinate

* First Appeal, No. 88 of 1880, from an order of Pandit Gopal Rai, Munsif of East Budaun, dated the 22nd November 1879.

Judge, but brought into Court a sum of Rs. 1,327, which represented the amount due on the decree made by the Subordinate Judge, and interest on the purchase-money deposited by the auction-purchaser, and prayed that the sale might be set aside. The decree-holder and the auction-purchaser consented to the sale being set aside, and the Subordinate Judge set it aside, by an order dated the 22nd July 1879. On the 29th July 1879, the decree-holder applied to the Munsif that the sale might be confirmed as regards the decree made by the Munsif, and that the amount due on that decree might be paid to him out of the purchase-money. On the 19th November 1879, the auction-purchaser also applied to the Munsif to have the sale confirmed. On the 22nd November 1879, the judgment-debtors not having appeared, the Munsif, observing that the judgment-debtors had not objected to the sale, made an order confirming the sale, and directing that the amount due on the decree, Rs. 1,084-3-0, should be paid out of the purchase-money to the decree-holder, and the balance to the judgment-debtors. The judgment-debtors appealed to the High Court, contending, *inter alia*, with reference to s. 285 of Act X of 1877, that the Munsif was precluded from determining whether the sale should be confirmed or not, that matter having been previously determined by a superior Court.

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Mr. Chatterji and Babu Jogindro Nath Chaudhri for the appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the respondents.

The Court (SPANKIE, J., and OLDFIELD, J.) delivered the following judgments:—

SPANKIE, J.—The rights and interests of the judgment-debtors in Mauza Majhia were sold on the 20th May 1879 in execution of two decrees, one by the Subordinate Judge and the other by the Munsif of East Budaun. The former, on the application of the judgment-debtors, cancelled the sale in satisfaction of the decree in his Court. He pointed out certain irregularities in the conduct of the sale, and goes on to say: "Irrespective of irregularity and improper proceedings in the Revenue Court, there is another point

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deserving attention, viz., that the present price is very low as compared with that fetched at the former sale (which had been set aside), i.e., Rs. 1,905: the judgment-debtor, objector, had diligently brought and tendered in cash the whole amount of the decree due up to this date, the interest on the purchase-money deposited by the vendee, and the auction-fee, being Rs. 1,327, the entire amount due to the decree-holder and to the auction-purchaser." The decree-holder's pleader prayed that the money might be sent to the Treasury and said that he would summon his client and have the money paid to him. The auction-purchaser's pleader appears to have acquiesced in the Subordinate Judge's order cancelling the sale, and he too prayed that the money might be sent to the Treasury. The Subordinate Judge then records that, under the circumstances mentioned above, "the Court in equity and out of compassion is inclined to set aside the auction-sale objected to by the judgment-debtor; no sufficient reasons have been assigned by the auction-purchaser in the written and oral statements for rejecting the judgment-debtor's objections." The order dated 22nd July 1879 sets aside the sale of the judgment-debtor's rights, and directs a refund to the auction-purchaser of the purchase-money deposited by him in the Revenue Treasury. There is no reference whatever in the Subordinate Judge's proceeding to the sale that had been ordered by the Munsif. The application for execution in the Munsif's Court had been made on the 21st March 1879, a date prior to that for execution in the Subordinate Judge's Court. On the 29th July, after the Subordinate Judge had cancelled the sale in satisfaction of the decree of his Court, the decree-holder, who held *both* decrees, applied that the sale might be confirmed as regards the decree of the Munsif's Court, urging that the property had been sold in satisfaction of both decrees at one and the same time; that the judgment-debtor had paid up in full the decree of the Subordinate Judge's Court; that the property had been released to the judgment-debtor, but that the decree of the Munsif's Court remained still due. He therefore begged that out of the sale-proceeds the amount due to him as decree-holder might be paid. The auction-purchaser, Durga Prasad, on the 19th November prayed that the sale might be confirmed in his favour, urging that there

had been no irregularities and he had deposited the purchase-money in the Collector's Treasury, where it had been for eight months: the judgment-debtor was cutting and appropriating the produce of the kharif crop: if the Court would not confirm the sale, he prayed that the purchase-money might be refunded with interest payable by the judgment-debtor, owing to whose act he neither obtained possession, nor holds it now. The judgment-debtor did not appear, nor did he urge any objection to the sale in satisfaction of the Munsif's decree; nor did he in his petition of objections in the Subordinate Judge's Court pray that it might be set aside as regards both decrees, nor does he even allude to the Munsif's decree. The Munsif, under these circumstances, on the 22nd November, four months after the Subordinate Judge's order, sums up the case as follows:—"Although the attachment of the property in execution of the decree of the Subordinate Judge's Court is of a date prior to the application for execution in this case, yet as the amount of that decree is paid up in full, the aforesaid attachment cannot now be maintained, and since the defendants failed to set up any objection as to the irregularity of the proceeding, the present sale under the provisions of s. 312, Civil Procedure Code, is confirmed."

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It is urged in appeal by the judgment-debtor (i) that the order of the Munsif is opposed to s. 13, Act X of 1877, as the Subordinate Judge had already held the sale to be irregular, and had set it aside; and (ii) the order of the Subordinate Judge is the order of a superior Court, and, extending the principle of s. 285, Act X of 1877, the Munsif was precluded from trying a matter that had been previously adjudicated by the superior Court. As regards the first plea, s. 13, Act X of 1877, does not appear to apply at all. The Munsif was not trying any suit or issue within the meaning of that section: he was acting ministerially. No person had applied to his Court to set aside the sale on the ground of material irregularity in publishing or conducting the sale: as no such application as that mentioned in s. 311 had been made in the Court ordering the sale, the Court, under s. 312, was bound to confirm the sale. As to the second plea, the section cited (285) refers to attachments and forms one of the sections relating to attachment

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of property. It has no relationship with the sections of the Code which refer to sale and delivery of property. The section deals with the case in which property, *not in the custody* of any Court, has been attached in execution of decrees of more Courts than one, and it provides that the Court which shall receive or realize such property, and shall determine any claim thereto, and any objection to the attachment thereof, shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. We cannot extend this section in the direction of sales and delivery of property. The Court which receives or realizes property, property not in the custody of the Court, is to determine any claim thereto and any objection to its attachment, but there its authority ends. It deals with matters preceding sale and no provisions appear to have been made for such a case as the present, when sale has been made and requires to be confirmed, and where in one Court the sale has been cancelled and in the other it has been confirmed. S. 295, to be sure, provides that, whenever assets are realized by *sale* or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably amongst all such persons. This section, however, would seem to imply that the persons referred to must be decree-holders of the Court holding the assets, who, prior to the realization, have applied to the Court for execution of their decrees. There can be no such analogy as the appellant contends for on the strength of s. 285 of the Code. A decree can only be executed by the Court which passed it or by the Court to which it is sent for execution under the provisions of the Code and s. 223. The case before us does not fall within the provisions of s. 223. By s. 230 application for execution must be made to the Court which passed the decree or to the Court to which the decree has been sent for execution. The Court ordering a sale is the Court that made the decree and to which application for execution must be made. That Court alone can cancel or confirm the sale, as regards its own decree. The Subordinate Judge had

no jurisdiction to deal with the decree of another Court after sale in execution of that decree.

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The Subordinate Judge appears to have acted with material irregularity, if not illegally, in cancelling the sale in satisfaction of the decree of his own Court. The judgment-debtor did not press his objections against the sale, but paid the amount of the decree in full. It was not, under these circumstances, necessary to confirm or to cancel the sale, if, as I assume, both the decree-holder and auction-purchaser were content that it should not operate, so far as the decree of the Subordinate Judge's Court was concerned. A sale could only be set aside under ss. 311 and 313, but no sale can become absolute until it has been confirmed under s. 314. Again, if the judgment-debtor be understood to have been pressing his objection, inadequacy of price is not a sufficient reason for setting it aside. It was not shown from the judgment that the judgment-debtor had sustained a substantial injury by reason of the irregularity. But the strong point of the case seems to me to be that the Subordinate Judge has no jurisdiction in regard to a decree of another Court, and that, even if he was at liberty to cancel the sale, he could only do so as regards the decree in his own Court. I would not interfere but would dismiss the appeal with costs.

OLDFIELD, J.—I have had some difficulty as to the disposal of this case and doubt as to the legality of the Munsif's order. It may be that it was the intention of the provisions in s. 285, Civil Procedure Code, to give to one Court the disposal of questions relating to auction-sales when the sale has been made in execution of two or more decrees of different Courts. The section directs that, when property, not in the custody of any Court, has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property shall be the Court of highest grade. The words "realize such property" must mean realize by sale and may be intended to give the Court exclusive power in all matters connected with sales. The expediency of such a rule seems obvious, for otherwise we shall have different orders made by different Courts with reference to the same set of facts; objections allowed by one Court as to sales which have been disallowed by another; a sale confirmed by one and set aside by another

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Court; separate orders emanating from each Court for confirming a sale, with separate sale-certificates from each Court granted to the same auction-purchaser in regard to the same sale, each bearing different dates; and confusion of other kinds may occur. But however this may be, it is open to us to make a proper order in the case, and the Munsif's order has done substantial justice, and I am not disposed to interfere. The Subordinate Judge clearly intended only to deal with the sale so far as it affected his own decree, and his order for setting the sale aside, even so far as concerned his decree, was obviously illegal. I concur with my honourable colleague in dismissing the appeal with costs.

Appeal dismissed.

1880
December 20.

Before Mr. Justice Pearson and Mr. Justice Oldfield.
SIA DASÍ AND OTHERS (DEFENDANTS) v. GUR SAHAI (PLAINTIFF).*

Hindu Widow—Alienation—Reversioner—Estoppel.

A Hindu widow in possession of her deceased husband's separate landed estate, her deceased husband's mistress and his illegitimate daughter, and the next reversioner to such estate, with the object of adjusting family disputes, entered into an arrangement by an instrument in writing for the distribution of such estate. A remoter reversioner to such estate was a witness to such instrument, and took a prominent part in making such arrangement, and the same had his full consent. *Held* that such remoter reversioner was estopped by such conduct from afterwards questioning the legality and genuine character of such distribution and the validity of assignments made by the persons who shared in such distribution.

Observations on the power of a remoter reversioner to question alienations by a Hindu widow in which the next reversioner has concurred.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram* for the appellants.
Mr. *Chatterji* for the respondent.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The property in suit belonged to one Sidh Gopal, paternal uncle of plaintiff: Sidh Gopal died in 1857 and was succeeded by his widow, Sia Dasi. The next reversioner after the widow was Sheo Prasad, half-brother of Sidh Gopal, and he, and Sia

* First Appeal, No. 21 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 10th December 1879.

Dasi, and Mitala Kuar, the mistress of Sidh Gopal, and her daughter, Ram Dulari, entered into an arrangement for the distribution of the property left by Sidh Gopal, and executed a deed dated the 30th May 1867, by which certain estates were assigned to Mitala Kuar and her daughter in trust for the maintenance of a temple; other estates were conferred on Mitala Kuar and her heirs; others on Ram Dulari and her heirs; other estates were assigned to Sheo Prasad; and an 8-anna share in the village of Sidhali was assigned to Sia Dasi for her life to go at her death to Sheo Prasad. Sheo Prasad sold an estate to Basant Singh, defendant, and after Sheo Prasad's death his sons sold another to Gajadhar Singh and Munni, defendants. Sheo Prasad died in 1868, predeceasing Sia Dasi, who on the 15th August 1876 executed a deed by which she conveyed to Mitala Kuar and the heirs of Sheo Prasad the property which had been assigned to her, in consideration of their having discharged certain ancestral debts for which she was liable. The plaintiff brings this suit, as the reversioner entitled at Sia Dasi's death to the property left by Sidh Gopal, to set aside the conveyance made under the deeds of 1867 and 1876 and the sales made to Basant Singh and Gajadhar Singh and Munni. The claim has been decreed, and the two material grounds on which the decision is questioned in appeal are (i) that the conveyances by the deed of 1867 having been made by Sia Dasi in concert with and with the consent of Sheo Prasad, the immediate reversioner, a complete title was conveyed under them which a remoter reversioner cannot question; (ii) assuming that such is not the case and plaintiff could have contested the legality of the said conveyances, he is estopped from doing so now, since he himself consented to the distribution of the property.

The first ground raises a somewhat difficult question, on which the decisions have been conflicting, as will be seen by referring to Norton's Hindu Law, Part 2, p. 627, where all the decided cases are referred to. The decisions in favour of the view that the widow and the nearest heirs living at the time of the conveyance can join in making a valid conveyance which no remoter heirs can question, appear to proceed either on the ground of estoppel or on the ground that in the lifetime of the widow the whole estate may be said to be in possession, and that, looking to the policy of the Hindu

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law, the reversioner has been sufficiently represented for the purpose of the conveyance when the widow and the nearest heir join in making it. The first ground has no application to the case before us, in which plaintiff does not claim through Sheo Prasad, but as heir to Sidh Gopal; and the objections which may be urged to the view are forcibly stated in Mayne's Hindu Law, s. 547. The author would reconcile the cases by holding that no person, who proved to be next heir at the death of the female tenant, and who was alive at the time of the transaction, should be bound by any consent except his own or that of some lineal ancestor through whom he claimed. This view may perhaps be supported by the case of *Koor Goolab Singh v. Rao Kurun Singh* (1), where the power of a remoter reversioner to question alienations in which the next heir was charged with having concurred was recognised. In that case, however, the next heir was a lady, the widow's mother-in-law, whose expectant interest was of a restricted character. We refrain, however, from deciding the question here, as, assuming that Sia Dasi and Sheo Prasad were unable to join in conferring a complete title, we consider the second ground of objection to which we have referred to be valid, and hold that plaintiff cannot now dispute the transfers made under the deed of 1867. He was himself a witness to that deed, and there is evidence which we see no reason to distrust that he took a prominent part in making the arrangement, which had his full consent, and was made with the object of settling family disputes. Plaintiff denies having witnessed the deed, and it appears he lodged a complaint in the police-station in 1867 on the subject; but there can be no doubt he did witness it; the evidence is direct on this point, and also as to his consent to the arrangement, and his conduct in not taking proper steps to establish the alleged fraud or to protect his interests is inconsistent with any other view, and he has not offered evidence to rebut that of defendants. With regard to the disposal of the property assigned by Sia Dasi under the deed of 1876, it cannot be questioned by plaintiff, as it is clear that it was done for the satisfaction of ancestral debts. The plaintiff's suit is therefore dismissed, with costs, by reversal of the decree of the lower Court.

Appeal allowed.

(1) 14 Moore's I. A., 176.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

BHAWANI (PLAINTIFF) v. ABDULLAH KHAN (DEFENDANT).*

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*Tenant-at-will—Enhancement of rent—Agreement to pay enhanced rent—
Act XVIII of 1873 (N.-W. P. Rent Act), ss. 12, 21.*

The patwári of a village entered in his diary that a tenant-at-will had agreed with the landholder to pay enhanced rent, but the agreement was not recorded, the terms as to rent were not stated, and there was nothing to show that such tenant had assented to such entry. *Held* that there was no record of such agreement within the meaning of s. 21 of Act XVIII of 1873.

THE plaintiff in this suit, alleging that the defendant had extorted from him, by illegal confinement, Rs. 44-1-3 in excess of the rent previously payable by him for certain land, claimed to recover that amount, and Rs. 200, compensation for such extortion. The defendant alleged in defence of the suit that the plaintiff had agreed to pay such excess and had paid the same willingly. It appeared that the plaintiff had agreed with the defendant's agent to pay enhanced rent for such land, in the presence of the patwári of the village, and the defendant's agent had signed the jamabandi in which the enhanced rent had been entered. The patwári recorded these facts in his diary. The Court of first instance decided the issues arising out of the allegations of the parties in favour of the defendant, and dismissed the suit. On appeal by the plaintiff, the lower appellate Court held, on the question whether the plaintiff's rent was liable to enhancement, that it was so liable, regard being had to s. 12 of Act XVIII of 1873, a written agreement by the plaintiff to pay enhanced rent having been recorded before the patwári. It also held that the excess rent had been willingly paid; and it affirmed the decree of the Court of first instance. On appeal by the plaintiff to the High Court, it appeared that it was doubtful whether the plaintiff was an occupancy-tenant or a tenant-at-will. The Division Bench before which the appeal came for hearing (STUART, C.J., and OLDFIELD, J.) observing that, if the plaintiff was a tenant-at-will, the provisions of s. 12 would not apply to him,

*Second Appeal, No. 1260 of 1879, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 3rd September 1879, affirming a decree of G. I. Laidman, Esq., Assistant Collector of the first class, Bulandshahr, dated the 23rd July 1879.

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remanded the case to the lower appellate Court to determine the issue, amongst others, whether the plaintiff was an occupancy-tenant or a tenant-at-will. The lower appellate Court found that the plaintiff was a tenant-at-will. On the return of this finding the plaintiff objected that he was not liable to pay enhanced rent, as no agreement by him to pay such rent had been recorded by the patwári, within the meaning of s. 21 of Act XVIII of 1873.

Mr. *Conlan* and *Babu Barodha Prasad Ghose* for the appellant.

Pandits Bishambhar Nath and *Nand Lal* for the respondent.

The Court (STUART, C.J. and OLDFIELD, J.) made the following order:—

OLDFIELD, J.—The Judge has found on the issues remitted that the plaintiff is a tenant-at-will, and in consequence he will not be liable, under the provisions of ss. 12 and 21 of the Rent Act, to pay rent in excess of the rent payable by him in the previous year, unless the landlord and he have agreed as to the rent to be paid, and such agreement has been recorded by the patwári of the village or the kánungo of the pargana in which the land is situate. There is no record of an agreement such as the section requires, for the entry in the patwári's diary cannot be held to meet the requirements of the law. The entry is only to the effect that the karinda of the village signed the jamabandi of 1286 Fasli, after causing a record to be made of an agreement on the part of the plaintiff and other tenants. But no agreement is recorded, the terms as to rent are not stated in the entry in the diary, and there is nothing to show that plaintiff consented to the entry. The plaintiff is therefore entitled to recover the excess rent paid by him with interest from date of payment. The lower appellate Court is directed to ascertain the date of such payment, and to try the issue whether plaintiff is entitled to damages on account of the rent having been extorted from him by illegal confinement or other duress, and, if so, what amount. We remand the case again for trial of the above issues and allow ten days for objections on submission of the finding.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

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ZALIM SINGH AND OTHERS (PLAINTIFFS) v. UJAGAR SINGH AND OTHERS (DEFENDANTS).*

Rent-free and revenue-free tenures—Assessment and settlement of revenue-free land—Jurisdiction of Civil Court—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 82, 83, 87, 88, 89, 241.

Certain land was settled with the defendants in this suit. The Settlement Officer having declared that the plaintiffs in this suit had acquired a proprietary right to such land under the provisions of s. 82 of Act XIX of 1873 and were entitled to hold it rent-free, the defendants applied to the Settlement Officer to assess such land and to settle it with the plaintiffs as the persons in actual possession as proprietors. This having been done by the Settlement Officer, the plaintiffs sued the defendants to be maintained in possession of such land free of revenue and for the cancelment of the Settlement Officer's order. *Held* that under s. 241 of Act XIX of 1873 the suit was not cognizable in the Civil Courts.

THE plaintiffs in this suit claimed to be maintained in possession of certain land situated in a village called Mahto, without payment of rent or revenue, by the cancelment of the Settlement Officer's order dated the 26th April 1875. It appeared that the predecessors of the defendants, co-sharers of such village, had made a grant of this land to the predecessors of the plaintiffs; and that, as the land had been held rent-free by the original grantees and their successors for eighty years, the plaintiffs had acquired, under the provisions of s. 82 of Act XIX of 1873, a proprietary right to it. This land had been taken into account at the settlement of such village with the co-sharers in assessing the revenue payable by them. When it was decided that the plaintiffs were the proprietors of the land and entitled to hold it rent-free, the father of the defendants, a co-sharer, applied to the Assistant Settlement Officer to settle the land with the plaintiffs as the persons in actual possession as proprietors. This the Assistant Settlement Officer did, assessing the land at Rs. 15-14-0; and on appeal the Settlement Officer affirmed the order of his subordinate by an order dated the 26th April 1875. The plaintiffs thereupon brought the present suit against the defendants, instituting it in the

* Second Appeal, No. 686 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 31st March 1880, reversing a decree of Maulvi Sakhawat Ali, Munsif of Akbarpur, dated the 21st June 1878.

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Munsif's Court. The defendants set up as a defence that the Civil Courts could not exercise jurisdiction over the matter of the suit. The Court of first instance disallowed this defence and gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court allowed the contention, and dismissed the suit. The plaintiffs appealed to the High Court.

Mr. *Chatterji* for the appellants.

Munshis *Hanuman Prasad* and *Kashi Prasad* for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—This is a suit to be maintained in possession of 11 bighas 3 biswas of land without liability to pay revenue assessed on it by the Settlement Officer, by reversal of his order. Plaintiffs claim to hold this land as a rent and revenue-free grant made to plaintiffs' ancestors by Madho Singh, the original proprietor. The Settlement Court has already taken up and determined under s. 82 of the Revenue Act the question of proprietary title in this land, which it has decided in plaintiffs' favour, who were declared to be proprietors under s. 82, and we are not concerned with that question now. Subsequently, however, the zamindar of the mauza, defendants' father, who had hitherto paid the revenue on this land, which was included in the general assessment of the mauza, applied in the Settlement Court that the revenue should be separately assessed on the land and settlement made of the land with the plaintiffs, who should be liable for payment of the revenue assessed. The Settlement Officer proceeded under the provisions of ss. 83, 87, 88, and 89 of the Revenue Act, and assessed revenue, to the amount of Rs. 15-14-0, on the land which he settled with plaintiffs. It is to set aside this order that this suit has been brought, and we are of opinion that it is not cognizable under s. 241 of the Revenue Act. The matter is one provided for in ss. 83, 87, 88, and 89, which were intended to include questions like the one before us, where there is a claim by the occupant of land to hold such land free from payment of revenue by him, and were meant to deal with all questions regarding the

assessment of such land and the making the settlement of it with the person in actual possession as proprietor (see s. 89). Taking this view, we hold that the suit was properly dismissed, and we dismiss this appeal with costs.

Appeal dismissed.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

RAM SARAN LAL (DEFENDANT) v. AMIRTA KUAR AND OTHERS
(PLAINTIFFS).*

Vendor and Purchaser—Sale—Mortgage—Redemption—Condition against alienation.

The co-sharers of a certain estate sold it to *B*. On the same day as the vendors executed the conveyance of such estate to *B* the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled; provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property and not otherwise. The heir of one of the vendors sold his own share of such estate to *A*, and *A* sued *B* to redeem such share.

Held by the Full Bench (STUART, C.J., doubting) that the nature of the transaction between *B* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title.

Held also by PEARSON, J., that the agreement was not of the nature of a personal contract enforceable only by the original vendors and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *B* could not, as implied by the Full Bench ruling in *Dook-chore Rai v. Hidayat-ullah* (1), treat as a nullity the sale which had been made to *A* and *A*'s right to redeem could not be reasonably denied and resisted; and that a transfer was not positively but only implicitly prohibited by the agreement, *B* merely declaring that he would not recognize the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect.

* Second Appeal, No. 1224 of 1879, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 13th May 1879, reversing a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Gházipur, dated the 21st December 1878.

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

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ON the 26th August 1862, a 9-anna 6-ganda share of a village called Rampur Jiwan was transferred by way of absolute sale to the defendant in this suit, Ram Saran. On that same day Ram Saran executed an instrument whereby he reserved to the vendors of that share the right of redemption, the material portion of that instrument being as follows:—"I, Ram Saran.....declare that, whereas I have under a deed of absolute sale dated this day purchased a 9-anna 6-ganda share, the property of Bisheshar Rai, Zalim Rai, and other persons, zamindars of mauza Rampur Jiwan.....for Rs. 1,800, I therefore agree that the said vendors may within a term of ten years, that is to say, on Jaith Sudi 15th, 1279 Fasli (corresponding with 21st June 1872), before sunset, pay the entire sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled: in the event of the whole sum not being paid, any one of the vendors paying his quota of the sale-consideration as specified in the deed of sale, the sale in respect of his share shall be invalid: if the sale-consideration is not paid at the time fixed and I have to foreclose and bring a suit, I shall be entitled to realize the costs from the vendors personally and from their other property:the whole sale-consideration, or a portion thereof paid by any of the vendors on account of his own share, if paid from their own pockets without transferring the property sold in any way, shall be received by me; but if it is paid, or deposited in court, being raised by transfer of the property sold, it shall not be received by me, nor shall the sale made by the vendors in my favour be considered cancelled." On the 1st May 1878, the grandson of one of the vendors sold his share of such 9-anna 6-ganda share, a 3-anna 2-ganda share, to the plaintiffs in this suit, who offered to redeem the share purchased by them. Ram Saran having refused to allow them to redeem such share, the plaintiffs, on the 17th September 1873, instituted the present suit against Ram Saran for the redemption of such share, founding their claim on the agreement of the 26th August 1862. The defendant denied the plaintiffs' right to redeem, stating as follows:—"The plaintiffs' claim on the basis of the agreement dated the 26th August 1862 is untenable, as the defendant is not bound to abide by the agreement as against the plaintiffs: the condition of restoring the share was limited to the vendors, and there

is nothing therein authorizing the heirs or representatives of the vendors to enforce that condition: a deed or stipulation, the application of which is restricted to a particular person, cannot be made the basis of a claim by another person: it is also provided by the agreement that the payment of the mortgage-money shall be accepted, if the vendors pay it out of their own pockets, without transferring the property; but that should they procure money by transfer and offer or deposit it in court, it should not be accepted: it is evident that the money in this case has been procured by a transfer of the property, and therefore the property should not be released from mortgage." The Court of first instance held that the plaintiffs could not be allowed to redeem, as the money for redemption had been raised by the transfer of the property, in violation of the condition contained in the agreement of the 26th August 1862; and dismissed the suit. The material portion of its judgment was as follows:—"The purchaser of the property cannot derive any authority for redemption from the agreement, which prohibits the transfer of the property: the privilege granted by the purchaser to the vendors at the time of the execution of the agreement had for its real object the preservation of the property in the family of the vendors: the condition of restitution contemplated the regaining of the property by the vendors, should they by any chance succeed in procuring money within ten years: if the vendors or their heirs had borrowed the money and paid it; the property would have been considered redeemable, as then there would have been nothing against public policy or law; but to do so after transfer of the property, which is clearly prohibited, is calculated to defeat the intention of the vendors and the purchaser to preserve the property in the family of the vendors: to concede the right to redeem and to take possession to the present purchasers (plaintiffs), contrary to the agreement in question, is inexpedient: such concession would involve a violation of the condition prohibiting transfer: the plaintiffs' claim is therefore improper." On appeal the lower appellate Court held that the plaintiff was entitled to redeem the property in suit, the material portion of its decision being as follows: "I find that the question has been finally settled by a Full Bench decision of the Allahabad High Court,—

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1880 *Dookchore Rai v. Hidayat-ullah* (1): in that case there was a stipulation against alienation; therefore the mortgagee contended that redemption could not be had by transfer of the property; also that the contract was a personal one between the mortgagor and the mortgagee; the Judges, however, ruled that such a stipulation against alienation could not operate to annul a *bond fide* conveyance to a third party, for the purpose of paying off the original mortgage; they further held that certain old rulings favouring the contention of the respondent in that case, as regards the contract being a personal one, did not commend to their mind: there is another ruling also bearing strongly on this point, and in which the Judges held the same view,—*Muhammad Zaka-ul-lah v. Beni Parshad* (2): there is also a third ruling, which is more clear to my mind, and almost similar to the present case,—*Ram Rup Singh v. Thakur Parshad* (3); in this case the Judges held that, as long as the mortgage was not absolutely foreclosed, the mortgagee retained his possession as that of a trustee for the mortgagor; he therefore cannot object to the mortgagor making any alienation of his property to a third party on more advantageous terms..... I may also observe that the stipulations mentioned in the agreement are opposed to the principles of the law of mortgage, which expressly empowers the mortgagor, his heirs, or assigns to sue for redemption, by depositing the money in court,—Macpherson on Mortgages, 5th ed., p. 104.” The defendant appealed to the High Court, the first three grounds of appeal set out in the memorandum of appeal being (i) that, as the plaintiffs claimed under the agreement of the 26th August 1862, they were bound by the terms and conditions thereof, and such terms and conditions showed that they were not entitled to redeem; (ii) that the agreement of the 26th August 1862 was a personal agreement between the defendant and his vendors, and the plaintiffs could not claim thereunder; and (iii) that the cases cited by the lower appellate Court were not applicable, as they related to agreements of a special nature. The appeal came for hearing before Stuart, C.J., and Pearson, J., who referred the question “whether the stipulation against alienation

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

(2) N.-W. P. H. C. Rep., 1869, 19th April 1869.

(3) 24 W. R., 429.

by any of the vendors was good, so as to invalidate any alienation not made according to the agreement" to the Full Bench.

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The order of reference was as follows :—

STUART, C.J.—In this case the two principal questions referred to at the hearing were, first, whether the agreement allowing the vendors mortgagors to redeem within ten years was merely personal to the original vendors and was not operative against their heirs or representatives. The second question discussed was whether the stipulation against alienation by any of the vendors was good so as to invalidate any alienation not made according to the agreement. On the first question it is quite clear to me that the original agreement must be taken as part and parcel of the whole transaction, and that it is not only operative against the original vendors themselves personally, but that it was transmissible to and operative against their heirs and successors or others in their right; in fact, that the agreement was in the same position as if it had been incorporated with the original sale-deed, the two documents making really one contract. But with regard to the second question, as to the validity of the condition in the agreement against alienation, I entertain some doubt, and I would refer the question to the Full Bench. If I was of opinion that the Full Bench ruling in *Dookchore Rai v. Hidayut-ullah* (1), relied on by the respondents at the hearing, applied to this case, I would have no difficulty in dismissing the appeal. But I am rather inclined to think, although with some doubt, that the peculiarity of the stipulation in this case against alienation by any one of the conditional vendors takes the case out of the principle laid down by the Full Bench; and I concur in the observations on that ruling in a judgment by a Division Bench of this Court (Pearson and Turner, JJ.) in *Mahammad Zaka-ullah v. Beni Parshad* (2), where it was remarked: "This ruling is, in our opinion, applicable to cases in which the debt is at once discharged by means of the transfer, and does not sanction a gradual discharge of it by instalments, such as is provided by the sale-deed of 8th September 1865. A mortgagor may fairly object to an arrangement which would compel

(1) N.-W. P. H. C. Rep., F. B.,
1866-67, p. 7.

(2) N.-W. P. H. C. Rep., 1869,
13th April 1869.

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him to look for the payment of his debt piecemeal during a protracted period to a person other than the one with whom he had originally dealt, and the objection can only be obviated by the debt being paid before the property liable for it is transferred." In such observations I entirely concur, and they appear to me to go a considerable way in favour of the appellant's contention in the present case.

The facts raising the question in this case are as follows:—By a deed of absolute sale, dated 26th August 1862, certain persons, Bisheshar Rai, Zalim Rai, and others, zamindars of mauza Rampur, &c., &c., sold that property to Ram Saran Lal, the defendant, appellant, for the consideration of Rs. 1,800. On the same day and immediately after the execution of this sale-deed, Ram Saran Lal, the vendee, made an agreement with his vendors by which he consented to their redeeming the property sold to him within a term of ten years from the date of sale, by paying "on Jaith Sudi 15th, 1279 Fasli, before sunset, the *entire* sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled." This applies to the whole transaction, but then the agreement goes on to provide "that in the event of the whole sum not being paid, any one of the vendors paying his quota of the sale-consideration as specified in the sale-deed, the sale in respect of his share shall be invalid." The agreement further provides "that the whole sale-consideration or a portion thereof by any one of the vendors on account of his share, if paid from their own pocket, without transferring the sold property in any way, will be received by me; but if it is paid or deposited in Court, being raised by transfer of the property sold, the money so raised will not be received by me, nor will the sale made by the sellers in my favour be considered as cancelled." In the Full Bench case to which I have referred the condition against alienation was in the usual general terms, "that the mortgagor should not alienate or mortgage the land, and that any such attempt at transfer should be void." In the present case, however, the agreement against alienation is precise and special, and I am not sure that the Munsif is not right when he suggested in his judgment that "the privilege granted by the vendee to the vendors at the time of the execution of the agree-

ment had for its real object the preservation of the property in the family of the vendors. The condition of restoration contemplated the regaining of the property by the vendors, should they by some chance succeed in procuring money within ten years." And the Munsif goes on to give it as his opinion that the intention of the vendors as well as of the vendee was the preservation of the property in the family of the vendors. But irrespective of such a consideration, it can be very well understood that the vendee or as he may be called, the mortgagee, had a clear interest to keep the whole property in his hands till the entire debt had been paid off, and I do not see why he should not be entitled to make such an agreement as the condition on which the vendors or mortgagors would be entitled to redeem. The vendee, in fact, appears to me to say by this agreement: "You, the vendors, have sold me this property absolutely for Rs. 1,800; I have paid you the money and the transaction is complete; but I am willing, notwithstanding, to allow you to receive the property should you repay the sale-price within ten years, on the condition, however, that my right as mortgagee and my security over the entire property is not to be disturbed or interfered with by any partial alienation on the security of any portion of the property. At the same time I am willing to accept any payment by any one of the vendors towards discharge of the mortgage-debt, if they can find the money in any other way. Such is the condition on which alone I consent to your redeeming within ten years." Now was not the vendee, mortgagee, entitled to make such an agreement and to have it enforced? I am inclined to think he was.

But the question is, as I have already said, not unattended with doubt and difficulty, and I would therefore refer it to the Full Bench on the Court.

PEARSON, J.—Having been prepared since the 24th April last to deliver judgment in this case, which was heard by us on the 15th idem, I regret that its disposal should be further indefinitely postponed by a reference to the Full Bench, which, in my opinion, is unnecessary, although in courtesy I assent to it. The object of the proposed reference is not professedly to call in question the correctness of the Full Bench ruling in *Dookhore Rai v Hidayut-*

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ullah (1), but only its applicability to the present case. Now it may be conceded that the ruling aforesaid is not directly applicable in the case now before us. In the case which came before the Full Bench, the mortgagor had expressly contracted not to alienate the mortgaged property by sale or mortgage; and it was held that such a stipulation could not operate to avoid a *bonâ fide* conveyance by the mortgagor of his equity of redemption to a third person for the purpose of paying off the mortgage-debt. In the present instance, no such contract was entered into by the mortgagors; but, in the instrument by which the sale was converted into a redeemable mortgage, the mortgagee declared that he would only receive back from them the sale-consideration, which had become the mortgage-debt, if paid out of their own pockets, and that, if it were raised by transfer of the property, he would not receive the money back from them, nor cancel the deed of sale which had been executed in his favour. Strictly speaking, no question arises "whether the stipulation against alienation by any of the vendees was good, so as to invalidate any alienation not made according to the agreement." If the above-mentioned declaration were equivalent to a prohibition of alienation, the principle of the Full Bench ruling, that not even a contract on the part of the mortgagors not to alienate would invalidate a *bonâ fide* alienation, would *a fortiori* apply to a simple prohibition of alienation on the part of the mortgagee. But the declaration is not a positive and direct, but at the most an implicit, prohibition of mortgage. It is only a refusal in the event of a transfer to recognize the transferee of the equity of redemption as having acquired such an equity by the transfer, and to cancel the deed of sale which had been executed in his own favour. The real question which calls for determination is whether such a declaration possesses any legal force or effect, or was not beyond the competence of the mortgagee, or may not equitably be disregarded.

The plaintiff in this suit have only purchased a portion of the mortgaged property, and sue for the recovery of that portion by payment of a proportionate part of the mortgage-debt. By the instrument executed by the vendee on the 26th August 1862.

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

whereby the sale was converted into a mortgage, he agreed that "the whole sale-consideration or a portion thereof by any one of the vendors on account of his share (if paid from their own pockets without transferring the property sold to me in any way) will be received by me." The frame of the suit is not therefore objectionable. The claim to partial redemption is not open to exception, if the plaintiff's right to redeem cannot be denied; partial redemption by a vendor's representative affects the security no more than partial redemption by one of the vendors. The substantial right of the mortgagee is to recover the money lent by him; the transfer of a share of the mortgaged property to the plaintiffs has provided for the payment of a proportionate share of the mortgage-debt; and such a condition as that imposed by the deed of the 26th August 1862, that the money must come out of the mortgagors' pockets, and may not be raised by a transfer of the right of redemption, appears to be a condition of a wanton, arbitrary, and oppressive nature, such as the Courts would hesitate to enforce, as being opposed to those principles of justice and equity which govern their decisions.

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The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad* for the appellant.

Pandit Ajudhia Nath and *Munshi Sukh Ram* for the respondents.

The following judgments were delivered by the Full Bench:—

STRAIGHT, J. (PEARSON, J., SPANKIE, J., and OLDFIELD, J., concurring.)—The single question submitted to us by this reference is whether the condition in the agreement of the 26th August 1862, by which redemption of the property sold under the deed of the same date is hampered, can be enforced, so as to defeat *bond fide* purchasers for value of a portion of the rights and interests of the mortgagors. The answer to this depends upon whether the transaction between the parties was in reality a sale, or amounted simply to a contract of mortgage, under which the mortgagors would necessarily reserve their right to redeem. In our opinion, in face of the agreement as a redemption, it is impossible to hold that there was any sale. The complexity given to the

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bargain between the parties by the execution of two instruments, one qualifying the other, cannot alter its true character, the precise legal description of which must be determined by reading both of them as a single and indivisible contract. The relation created thereby between the parties was essentially that of mortgagors and mortgagee, and until the mortgagee took the prescribed steps to foreclose and establish his absolute proprietorship, their relative positions continued the same, and down to the last day of the twelve months' period of notice of foreclosure the rights of the mortgagors or those acquiring their interests remained in existence and could at any moment be exercised. The substance of the contract was the pledge of the estate for the debt, and the time of its repayment was not of its essence, and Courts of Equity invariably relieve against the forfeiture of the estate by sanctioning redemption at any time upon paying the mortgage-debt with interest. The mortgagors in the present case therefore having the ordinary right to redeem, the sole point for further consideration is, was the condition of the agreement of the 26th August, 1862 inconsistent with their position, and of such a nature as to place them at a disadvantage? We entirely concur in the observations of Mr. Justice Pearson upon this point, and we regard the condition as most inequitable and incapable of enforcement, either against the original mortgagors or their representatives in title.

STUART, C.J.—I am not disposed, on reconsideration of this case, to express a dissent from the opinion recorded by my colleagues, although I retain the doubt I suggested in my referring order respecting the second question I there considered, viz., whether the stipulation against alienation by any of the vendors was good, so as to invalidate a sale not made according to the agreement, or in other words, as my colleagues put it, “whether the transaction between the parties was in reality a sale or amounted simply to a contract of mortgage.” My colleagues are of opinion that the transaction was a mortgage, and I am free to acknowledge that the opinion I myself expressed in the referring order, “that the agreement was in the same position as if it had been incorporated with the original sale-deed, the two documents making really one contract,” goes to support that view of the case; and

there are allusions in the so-called agreement which I admit may fairly be said to have the same effect. Thus I observe it is stipulated that, "if the sale-consideration is not paid at the time fixed, and I the executant have to foreclose and to bring a regular suit, I shall realize the costs from the persons and other properties of the vendors." And there can be no doubt that this stipulation supports the view that the transaction was a mortgage and not a sale out and out. A very careful consideration of the record, however, causes me considerable hesitation in holding that such was the real understanding of the parties towards each other. In the first place there was really no agreement, that is, no mutual agreement between the parties at all. What was so called was entirely a one-sided document expressed in the name of Ram Saran Lal the defendant and vendee alone, and this document appears to me to amount to nothing but a promise of a favour or privilege in the nature of a *nudum pactum*, which did not change the transaction into a mortgage, or in any way invalidate it as a sale, and if that was so there could have been no reservation on the part of the defendants of their right to redeem; and it appears to me that the agreement itself shows this. That document, as I have said, runs exclusively in the name of Ram Saran Lal the defendant and vendee, the plaintiffs being no parties to it; and on the recital "that, whereas I have under a *deed of absolute sale* dated this day purchased a 9-anna 6-ganda share, the property of, &c., for Rs. 1,800," it proceeds to state, "I, therefore, while in a sound state of health and reason, without coercion and reluctance, of *my own free will and accord*, agree and record that the aforesaid vendors may within a term of ten years, that is, on Jaith Sudi 15th, 1279 Fasli, before sunset, pay the entire sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled"; and the same unilateral character of the document appears to me to qualify all the other portions of it, even including the clause I have referred to as appearing to favour the idea that a sale and not a mortgage was intended. If so, the transaction might, I think, be fairly considered to fall within the principle laid down in Sugden's Vendors and Purchasers (14th edition, 1862, p. 199):—"If a power to repurchase be given upon a condition * * the right (that is, the right to repurchase) cannot be enforced unless the con-

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dition has been complied with, *for it is a privilege conferred.*" To the same effect is the law laid down in a case decided by the Privy Council in 1860, that of *Shaw v. Jefferey* (1). This was a case relating to several deeds, and at p. 461 of the judgment it is stated:—"Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, their Lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of repurchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties."

As to the right to redeem which my colleagues seem to consider has been reserved, there was really no such reservation, certainly no express reservation, nor even one by implication, so far as relates to the mind and intention of both the parties, but was rather a favour or privilege voluntarily granted or conferred by the vendee, and therefore not forming part of the contract in its mutuality. These are my doubts, but I do not entertain them so strongly as to feel induced to record a dissent from the opinion of my colleagues.

On the case coming again before the Division Bench (STUART, C.J., and PEARSON, J.) for disposal, the following judgments were delivered:—

STUART, C.J.—I consider it unnecessary to offer any further observations in this case, but content myself with stating that the decision of the Full Bench, viewed in relation to the pleas on the record, is that the reasons assigned in the memorandum of appeal must be disallowed and the appeal dismissed with costs.

PEARSON, J.—The particulars of the case and the reasons of the decisions of the lower Courts are clearly set forth in their judgments and need not be recapitulated. We have to deal with the grounds of appeal. If the agreement executed on the 26th August 1862, by the defendant, whereby the sale just before made to him was converted into a redeemable mortgage was of the nature of a personal contract enforceable only by the original vendors and

(1) 31 Moore's P. C. C., 432.

not by their representatives, it follows that the plaintiffs' vendor, who is the grandson of one of the original vendors or mortgagors, would be incompetent to redeem his share from mortgage. The proposition that, in the event of the death of any of the original mortgagors before the foreclosure of the mortgage, the agreement relating to the redemption of his share determined, is not supported by any express provisions to that effect, and is not warranted by the mere fact that there are not any express terms extending the right of redemption to the heirs of the original mortgagors. If the opinion of the Court of first instance be correct that the object in view was the preservation of the property in the family of the vendors, that object would have been defeated by the construction which should deprive their heirs of the right of redemption. I cannot perceive any sufficient ground for concluding that the plaintiffs' vendor had not the right of redemption. He has transferred it by sale to the plaintiffs, and the validity of the transfer is the next question. In the case which came before the Full Bench—*Dookchore Rai v. Hidayut-ullah* (1)—the mortgagor had contracted not to alienate the mortgaged property by sale or mortgage, but it was held, and the ruling is binding upon us, that such a stipulation could not operate to avoid a *bona fide* conveyance by the mortgagor of his equity of redemption to a third person for the purpose of paying off the original mortgage-debt. In the present case the mortgagors did not so contract, after the conversion of the sale into a redeemable mortgage, but the mortgagee on his part was pleased to declare that he would only receive back from them the sale-consideration which had become the mortgage-debt if paid out of their own pockets, and that, if it were raised by transfer of the property, he would not receive the money from them, nor cancel the deed of sale which had been executed in his own favour. Even were a transfer prohibited, if he could not, as the Full Bench ruling above-mentioned seems to imply, treat as a nullity the sale which has been made to the plaintiffs, the right of the latter to redeem the property could not be reasonably denied and resisted. The defendant, if he had been injured by the act of the plaintiffs' vendor in making the transfer, might have his remedy; but the transfer would not otherwise affect his right as

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(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

1880 mortgagee to the recovery of his mortgage-debt than by providing
 RAM SARAN LAL v. AMRITA KUAR. for the repayment of a part thereof, and would be maintainable. But a transfer is not positively, but only implicitly, prohibited by the terms used in the instrument executed by the mortgagee converting the sale into a redeemable mortgage. What he says is that he will not recognize the transferee as having acquired by the purchase the equity of redemption or cancel his own sale-deed. Such a declaration appears to be beyond his legal competence and to be of no effect.

For the above reasons, and those recorded by me on the 11th August last, and in reference to the opinion expressed by the Full Bench on the 30th November last, on the question referred to it by the Chief Justice in this case, I would disallow the first three pleas in appeal. I would also disallow the two remaining pleas, for the money has been deposited, and nothing has been found to be due on account of enbankments and wells. I would therefore dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

1880
 December 22.

Before Mr. Justice Spinkis and Mr. Justice Straight.

MUKHI (JUDGMENT-DEBTOR) v. FAKIR (DECREE-HOLDER).*

Dismissal of appeal for appellant's default—appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 540, 556, 558.

An order under s. 556 of Act X of 1877 dismissing an appeal for the appellant's default is not a "decree," within the meaning of s. 2, and is not appealable.

THE judgment-debtor in this case appealed from the order of the Court executing the decree disallowing his objections to its execution. On the day fixed for hearing the appeal the appellate Court ordered the appeal to be "struck off," on the ground that neither the judgment-debtor nor his pleader were present. The judgment-debtor thereupon applied to the appellate Court for the readmission of the appeal, under s. 558 of Act X of 1877, and the Court

* Second Appeal, No. 62 of 1880, from an order of J. W. Power, Esq. Judge of Ghazipur, dated the 29th March 1880, affirming an order of Chaudhri Jagan Nath, Munsif of Saidpur, dated the 10th January 1880.

refused to readmit it. The judgment-debtor subsequently appealed to the High Court from the order striking off the appeal for his default.

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Mr. Niblett and Lala Jokhu Lal for the appellant.

The Senior Government Pleader (Lala Juala Prasad) for the respondent.

The High Court (SPANKIE, J., and STRAIGHT, J.) delivered the following judgment:—

STRAIGHT, J.—The only appeal before us relates to the order passed by the Judge under s. 556 of the Civil Procedure Code, striking off the appeal for default in appearance of the appellant either in person or by pleader. The proper course for the appellant to have pursued was to apply to the lower appellate Court under s. 558 for readmission of his appeal, and this he seems to have done, and an order was passed refusing his application. This order is neither before us, nor indeed is it appealed, and we cannot consider it. All we have to do with is the order striking off the appeal for default, and this, in our opinion, is not open to second appeal. For the “order,” though it means the formal expression of the Court’s decision in respect of the default of the appellant, does not come within the definition of decree in s. 2 of the Civil Procedure Code.

Appeal dismissed.

APPELLATE CRIMINAL.

1880
December 24.

Before Mr. Justice Pearson and Mr. Justice Straight.

EMPRESS OF INDIA v. BHAGIRATH.

Murder—“Corpus delicti”—Act XLV of 1860 (Penal Code), s. 302.

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of the murder.

THIS was a reference to the High Court by Mr. W. C. Turner, Sessions Judge of Agra, for confirmation of the sentence of death passed by him on one Bhagirath convicted of the murder of one Ganga Das. Bhagirath had been also charged before the Sessions Judge at the same time with the murder of Ganga Das’ wife,

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Baiji. It appeared from the evidence that he had murdered and robbed Baiji, but the Sessions Judge did not convict him of Baiji's murder, as her body had not been discovered; but convicted him, under s. 397 of the Indian Penal Code, of robbing and causing grievous hurt to her.

The High Court (PEARSON, J., and STRAIGHT, J.) made the following order:—

STRAIGHT, J.—Upon the facts there was no course open to the Sessions Judge but to convict the accused of the murder of Ganga Das, and to sentence him to death. The evidence was conclusive and overwhelming, and left no doubt of his guilt. We are constrained, however, to remark upon a passage in the judgment of the Sessions Judge which, proceeding as it does upon a misconception of the law, must be corrected. He says: "The presumption is that Baiji was certainly killed, but no trace of her body has been found, and therefore I doubt if, in her case, the charge of murder can be sustained." We must most unhesitatingly and distinctly point out to the Judge that it is not imperatively essential, in order to justify a conviction for murder, that the "*corpus delicti*" should be forthcoming. To recognize any such condition precedent, as being absolutely necessary to conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever enough to make away with or destroy the bodies of their victims. Such a principle once admitted would in some instances render the administration of justice impossible. The doubt of the Sessions Judge was an altogether ill-founded and erroneous one, and the mere circumstance that the body of Baiji had not been found was a most inadequate reason upon which to refuse to convict the accused of her murder. Apart from Bhagirath's own confession of having killed the woman Baiji, there is cogent and convincing proof of his guilt and of her death by violence at his hands. Whatever might have been the view of this Court as to the desirability of carrying out a capital sentence under such circumstances is another matter, which need not now be discussed, but so far as the Judge was concerned he should have had no hesitation in convicting Bhagirath under s. 302 of the Penal Code for

the murder of Baiji. We confirm the conviction and sentence of Bhagirath for the murder of Ganga Das, and direct that it be carried into execution. We also order that the record in this case be amended by quashing the conviction of the accused under s. 397 of the Penal Code, a conviction under s. 302 for the murder of Baiji being substituted therefor. Having regard to the sentence already confirmed, it is unnecessary to make any order as to punishment in respect of this second conviction.

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CIVIL JURISDICTION.

1881
January 3.

Before Mr. Justice Spankie and Mr. Justice Straight.

MADDA (PLAINTIFF) *v.* SHEO BAKHSH (DEFENDANT).*

Remarriage of Hindu Widow—Custom—Breach of Contract—Act XV of 1877 (Limitation Act), sch. ii, Nos. 115, 120.

The plaintiff sued the defendant, who had married the plaintiff's deceased brother's widow, to recover, by way of compensation, the money expended by his deceased brother's family on his marriage, founding his claim upon a custom prevailing among the Jats of Ajmere, whereby a member of that community marrying a widow was bound to recoup the expenses incurred by her deceased husband's family on his marriage. *Held* that the suit was one of the character described in No. 115, sch. ii of Act XV of 1877, and not in No. 120 of that schedule, and the period of limitation was therefore three and not six years.

THIS was a reference to the High Court by the Judges of the Small Cause Courts at Ajmere and Nasirabad. The statement of the facts of the case and the point on which doubt was entertained was as follows:—

“The plaintiff in this case sued for recovery of Rs. 300 as compensation payable to him by the defendant in consequence of the latter having contracted a marriage with the widow of the plaintiff's deceased brother Surta; plaintiff alleging that the remarriage took place in the month of Asárh 1933 (June 1876, A.D.). Defendant pleaded, among other things, that the suit was barred, the remarriage having taken place six years ago. The

* Reference, No. 8 of 1880, by Pandit Bhag Ram, Judge of the Court of Small Causes at Ajmere, and Captain A. P. Thornton, Judge of the Court of Small Causes at Nasirabad.

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present suit was instituted on the 13th July 1880. Defendant contends that it is governed by No. 115, sch. ii, Act XV of 1877. Plaintiff avers that No. 115 applies only to compensation for breach of contract, express or implied, and that the present suit is governed by No. 120, sch. ii of Act XV of 1877, it being a suit for recovery of compensation, accrued to the plaintiff in consequence of defendant having remarried the widow of plaintiff's deceased brother, the suit not resting on any contract, but on the local custom prevailing among the Jats of Ajmere. We are of opinion that the suit involves a question of law which requires an authoritative ruling by the High Court, North-Western Provinces.

"The following question is therefore submitted for a ruling :— Is a suit for recovery of compensation, alleged to be payable by the defendant in consequence of the latter remarrying the widow of plaintiff's deceased brother, governed by No. 115, sch. ii, Act XV of 1877, or by No. 120, sch. ii, Act XV of 1877. The existence of a custom to the effect stated in the plaint is admitted by the defendant: the claim to compensation appears to be founded on the theory that, when a person remarries a widow, he is bound to repay the expenses incurred in the original marriage to the relatives of the deceased husband. As a rule no remarriage takes place until this necessary condition is fulfilled. We are therefore of opinion that the suit is governed by No. 115, Act XV of 1877, as the contract of remarriage implies immediate payment of compensation, and non-payment of such compensation is clearly a breach of the contract in pursuance of which the remarriage is effected."

The parties did not appear.

The High Court (SPANKIE, J., and STRAIGHT, J.) delivered the following judgment:—

SPANKIE, J.—No. 120, sch. ii, Act XV of 1877 can only apply where no period of limitation is provided elsewhere in the second schedule for a suit. I understand, however, that a local custom exists amongst the Jats of the Province of Ajmere to the effect that, on a man's marrying a widow, her deceased husband's friends may claim from that man to reimburse to them the expenses incurred at

the original marriage. The custom is so well known that we are told by the referring Judges that, as a rule, no remarriage of a widow is celebrated until this necessary condition, the reimbursement of the past marriage expenses, has been fulfilled. The custom then is so notorious that it may be said to become part of the marriage contracts in cases in which members of the brotherhood elect to marry widows of the brotherhood. The contract of marriage is admitted in this case. The local usage is admitted. It is not pretended that the parties have so contracted as to exclude the operation of this usage or custom. This usage being a part of the marriage contract, one of the parties to it has committed a breach thereof by not reimbursing the other party for the expenses of the original marriage, and the present suit is brought to recover as compensation the money spent in the former marriage. The claim is one which I would say falls under No. 115, sch ii of the Indian Limitation Act. It is for the local Courts to determine whether or not the suit is barred by limitation under No. 115.

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STRAIGHT, J.—I assume it has been clearly and accurately ascertained that the custom mentioned in the order of reference is of ancient origin, and that it has been uniformly and continuously recognized and acted upon among the Jats of Ajmere. If this be so, then there undoubtedly exists among them an implied obligation in the nature of a contract on the part of each member of the community to the remainder, in the event of his marrying the widow of the deceased brother of any one of them, immediately before, or upon such remarriage, to recoup the expenses incurred by the husband's family in respect of her first marriage. The plain character therefore of the present suit is compensation in damages for breach of the implied obligation or contract to repay the outlay incurred by the plaintiff and his family in and about the first marriage of the defendant's now wife, and it naturally falls into No. 115, Act XV of 1877. The view of the Judges of the Small Cause Court was a correct one, and three years' limitation from date of breach is the period applicable. When that breach took place, and if it is continuing, is for the local Courts to decide.

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January 3.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, Mr. Justice Oldfield, and Mr. Justice Straight.

DEBI CHARAN (PLAINTIFF) v. PIRBHU DIN RAM (DEFENDANT).*

Decree enforcing Hypothecation—Money-decree.

The obligee of a bond for the payment of money, in which immoveable property was hypothecated as collateral security, sued the obligor upon such bond claiming to recover the moneys due thereunder from the obligor personally and by the sale of the hypothecated property. He obtained a decree in such suit in these terms:—"That the claim of the plaintiff, with costs of the suit and future interest at eight annas per cent. per mensem, be decreed."

Held by the majority of the Full Bench that such decree was not merely a money-decree, but was also one for the enforcement of a lien.

Janki Prasad v. Baldeo Narain (1) distinguished by STUART, C.J.

Per SPINKIE, J., and STRAIGHT, J.—That such decree was a mere money-decree. *Mulq Fuzer Buksh v. Lala Manohur Doss* (2) and *Thamman Singh v. Ganga Ram* (3) followed.

THE plaintiff in this suit claimed to establish his right to bring a 6-pie share of a certain villiage to sale in execution of a decree held by him against one Dhundhai, dated the 21st March 1878. Dhundhai had, on the 9th December 1873, given the plaintiff a bond for the payment of certain moneys in which he hypothecated such share as collateral security for such payment. The plaintiff brought a suit against Dhundhai on this bond in which he claimed to recover the moneys due thereunder from the obligor personally and by the sale of such share. He obtained a decree in that suit, dated the 21st March 1878, in these terms: "The claim of the plaintiff, with costs of the suit and future interest at eight annas per cent. per mensem, be decreed." In execution of this decree he caused such share to be attached and advertised for sale. The defendant in the present suit, who was in possession of such share under a deed of sale of a date subsequent to the date of the plaintiff's bond, objected to the attach-

* Second Appeal, No. 328 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 8th January 1880, reversing a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 16th September 1879.

(1) I. L. R., 3 All., 216.

(2) N.-W.P. H. C. Rep., 1870, p. 29.

(3) I. L. R., 2 All., 346.

ment and sale, and his objection was allowed. The plaintiff in consequence brought the present suit against him to establish his right under the decree to bring such share to sale. On appeal by the defendant from the decree of the Court of first instance in the plaintiff's favour, it was contended by him that the plaintiff's decree of the 21st March 1878, was a mere money-decree, and did not enforce the hypothecation of such share, and the plaintiff was not entitled to bring such share to sale, it having passed to him, the defendant; and that the plaintiff's claim in the present suit to enforce the hypothecation of such share was barred by the provisions of s. 13 of Act X of 1877, as he had claimed in the former suit to have such hypothecation enforced, but such relief had not been granted to him by the decree in that suit. The lower appellate Court allowed the defendant's contention that the plaintiff's decree of the 21st March 1878 was a mere money-decree and not one enforcing the hypothecation of such share; and dismissed the plaintiff's suit.

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The plaintiff appealed to the High Court, contending that that decree was not a mere money-decree, but one enforcing the hypothecation of such share. The appeal came for hearing before STUART, C.J., and STRAIGHT, J., who referred to the Full Bench the question whether that decree amounted to one for enforcement of lien or not.

Mr. Niblett for the appellant.

The Senior Government Pleader (Lala Juala Prasad) and Hanuman Prasad for the respondent.

The following judgments were delivered by the Full Bench:—

PEARSON, J.—In reply to the question referred to the Full Bench I should say that, when a claim is decreed without reservation, whatever is included in the claim is included in the decree. In the case before us the claim was to recover Rs. 49, principal, and Rs. 34-13-9, interest, under a bond dated 9th December 1873, by sale of the property hypothecated in the bond. The claim was decreed, not a part of the claim but the whole claim. The decree contains the particulars of the claim, but, in ordering that the claim of the plaintiff be decreed with costs and interest

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at 8 annas per cent. per mensem, it may be that it does not "specify the relief granted" in the manner intended by s. 206 of the Civil Procedure Code. Notwithstanding the defect of specification, I am, however, of opinion that the decree is one for the enforcement of a lien and not merely a money-decree. Indeed if, in consequence of that defect, it could not be regarded as a decree for the enforcement of a lien, it could not for the same reason be regarded as a money-decree. But the decree cannot be treated as a nullity, nor can execution of it be reasonably refused merely on account of such a defect. There can be no doubt as to what relief was really granted by the decree because it is the same as what was claimed, and is specifically stated in the plaint and in the heading of the decree. No difficulty is caused in the execution of the decree by reason of any doubt of that sort. To deprive the decree-holder of the benefit of his decree on the ground of the defect noticed would be to administer the law so as to defeat the ends of justice. For that defect the Judge and ministerial officers of the lower Court and the pleaders of the parties in that Court are responsible. The last clause of s. 206 provides that, "if the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error." In the present instance the decree is not at variance with the judgment, and the defect of specification is hardly a clerical or arithmetical error; but I cannot conceive that the Court would be incompetent to supply the defect, if it were absolutely impossible for the decree to be executed without amendment. But I have already intimated that in my judgment the decree framed is clearly and unambiguously in terms as well as in intention one both for money and enforcement of lien, and should be executed as such.

OLDFIELD, J.—I entirely concur in the view taken by Mr. Justice Pearson.

STUART, C.J.—The answer of Mr. Justice Pearson in this reference and concurred in by Mr. Justice Oldfield so clearly expresses the view I myself take of the question submitted to us that

it seems unnecessary for me to say more. I may observe, however that this opinion is in entire accordance with my understanding of the rulings of this Court which were relied on at the hearing. Much stress was laid on a decision of a majority of the Full Bench of this Court in the case of *Janki Prasad v. Baldeo Narain* (1), and it was argued that on the principle there applied the decree in the present case does not cover the hypothecation property, but is a mere money-decree. That case, however, was entirely a different one from the present. There the claim no doubt recited the hypothecation in the bond, but the decree itself was notwithstanding expressly limited in its terms to the money sued for, and, with remarkable particularity, all the details and items of the money claim being set out together with a precise statement of the costs. Here the decree, after distinctly setting out the claim to recover "by sale of the said hypothecated (six English pies) share," being the property expressly hypothecated in the bond, ends thus: "It is decreed and ordered that the claim of the plaintiff be decreed with costs and interest at 8 annas." Words which I hold give recovery against the hypothecated property.

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STRAIGHT, J. (SPANKIE, J., concurring):—In reply to this reference we would say that, in our opinion, the words "the claim of the plaintiff with costs of the suit and future interest at 8 annas per cent. per mensem be decreed" do not amount to a decree for enforcement of lien. It is true that in the plaint relief was sought against the defendant personally and against the property pledged, and no doubt the claim under both heads is recapitulated at the commencement of the decree. But so far as the effective words of the decretal order are concerned, they, in our judgment, at best amount to nothing more than a decree for money. As regards the claim for enforcement of lien, there is no "clear specification" that relief is granted in respect thereof as required by s. 206 of the Civil Procedure Code: and it seems to us that, had the question of *res judicata* arisen in the case, we should have been bound to hold, in accordance with the provision contained in Explanation 3 of s. 13, that the relief as to enforcement of lien claimed in that plaint, not being expressly granted by the decree, must be deemed to have been

(1) I. L. R., 3 All., 216.

1881 refused. In holding this view, we are only following an authority—*Mulq Fugcer Buksh v. Lala Manohur Doss* (1)—which we both had occasion to consider in reference to a decision given by us in *Harsukh v. Meghraj* (2). There is also another case—*Thamman Singh v. Ganga Ram* (3)—and we have heard nothing in argument on this reference to lead us to doubt the accuracy of the judgments therein delivered, with the opinions expressed in which we may say we entirely concur. Under these circumstances, our reply to this reference is as already indicated.

1881
January 12.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF SAT NARAIN SINGH AND ANOTHER.
Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings—Act X of 1872 (Criminal Procedure Code), ss. 283, 362.

Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in court or by commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code, *held* that the conviction of the accused person must be set aside, and the case be re-opened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioners, Sat Narain Singh and Ram Alam Singh, were convicted on the 9th October 1880, in a trial before Babu Harnam Chandar Seth, exercising the powers of a Magistrate of the first class in the Mirzapur district, of rioting and causing hurt. They appealed to the Sessions Judge of Mirzapur, Mr. S. Moens, who on the 11th November 1880 affirmed the convictions. It appeared that the riot had taken place at a village called Dharmurpur, in which the petitioners resided. The defence of the petitioners was that they had not taken any part in the riot, not having been in that village on the day on which the riot occurred, but having been on that day at Chunar; and they applied to the Magistrate that a lady

(1) N.-W. P., H. C. Rep., 1870, p. 29. (2) I. L. R., 2 All., 345.

(3) I. L. R., 2 All., 342.

residing at Ohunar, called the Rani of Nipal, might be summoned in order that she might be examined on their behalf, or that she might be examined on their behalf by commission. The Magistrate refused to summon the Rani, or to have her evidence taken by commission, without recording his reasons for such refusal. The Magistrate made the following observations in his decision regarding the defence set up by the petitioners:—"Sat Narain Singh, Ram Alam Singh, and Amir Singh state that they were not in the village on the date in question and did not join in the riot: the first two say that they were at Ohunar, while the third deposes that he was at Benares: three witnesses have been adduced by the former, who depose that Sat Narain Singh came to the house of the Rani of Nipal on Friday evening and returned on Saturday evening, but their evidence is hardly reliable, because Sat Narain Singh is not now in the Rani's service, and the occasion on which he is stated to have been called was of such an ordinary nature that there was no special reason for his attendance: the worship which the Rani performed was of no extraordinary nature, but one performed every month almost in every respectable Hindu family: I have no doubt that these persons have come forward merely to help the accused, because it is impossible to believe that the Rani has such interest in the accused (who is not now in her service) as to invite him specially on the occasion of an ordinary religious ceremony: Sheo Gobind, witness, is always prepared to help Sat Narain Singh, and he admits that on a former occasion he also gave evidence in this man's favour: two persons out of the three mentioned in a summary manner that Ram Alam Singh was also at Ohunar, but the feelings with which they make this statement are apparent, i.e., merely with a view to assist a fellow-servant."

The ground on which revision was sought was that the Magistrate had refused to summon or to have examined by commission the most important witness for the defence, without recording his reasons for such refusal.

Mr. Dillon for the petitioners.

STRAIGHT, J.—I cannot say that the grounds upon which this application for revision is based have no force, nor can I, with

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sufficient certainty, make up my mind that the refusal on the part of the Magistrate, who tried the applicants, either to summon the Rani of Nipal or to take the necessary steps to obtain the issue of a commission to examine her, did not prejudice them in their defence. Apart from this, however, the Magistrate has omitted to satisfy the plain directions of the law, by failing "to record his reasons for refusing to summon the witness named," which reasons, had he given them, might have themselves been made the subject of appeal. It appears to me that there is no other alternative open but to set aside the convictions of Sat Narain Singh and Ram Alam Singh, and to order the Magistrate to re-open the case and formally dispose of the application for the examination of the Rani, in accordance with the provisions of the Criminal Procedure Code. If he decides to summon her or to have her evidence taken by commission, he will, after considering her statements, pass such orders on the whole case as may appear to him to be just and right. If he refuses to summon or have her examined by commission, it would probably be as well, before giving final judgment in the matter, to allow the accused to appeal to the Judge against such refusal. This record and order will be conveyed without delay through the Sessions Judge to the Magistrate of Mirzapur, for him to carry out the directions given him.

APPELLATE CIVIL.

1881
January 13.

Before Mr. Justice Pearson and Mr. Justice Straight.

TAWANGAR ALI (DEFENDANT) v. KURA MAL (PLAINTIFF).*

Suit to cancel instrument—Act XV of 1877 (Limitation Act), sch. ii, No. 91.

K, to whom *B* had given a usufructuary mortgage of certain land, promising to put him in possession, sued *B* for the mortgage money, *B* having failed to put him in possession. This suit was instituted on the 22nd November 1875. On the 25th of the same month, *K*, learning that *B* was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on *B* on the 29th November. On the 1st December 1875, *B* transferred certain land to *T* by way of sale. *K*'s suit was dismissed by the lower Courts, but the High Court, on the 7th August 1876, gave him a decree. Certain

* Second Appeal, No. 367 of 1880, from a decree of H. M. Chase, Esq., Judge of Saharanpur, dated the 13th January 1880, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 14th August 1879.

property belonging to *B* was sold in execution of this decree, but the sale-proceeds were not sufficient to satisfy the amount due on the decree. *K* thereupon, on the 1st July 1879, sued *T* to cancel the conveyance to him by *B* on the ground that it was fraudulent and without consideration. Held that the words in No. 91, sch. ii, Act XV of 1877, "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit," and consequently the period of limitation for *K*'s suit began to run, not merely when he had knowledge of the fraudulent character of the conveyance to *T*, but when, having such knowledge, it had become apparent to him that there was no other property than that conveyed to *T* available for the realization of the unsatisfied balance of his decree, and the suit was within time.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Colvin and Pandit *Nand Lal* for the appellant.

Mr. Conlan, Pandit *Ajudhia Nath*, and Munshi *Sukh Ram* for the respondent.

The High Court (PEARSON, J., and STRAIGHT, J.) delivered the following

JUDGMENT.—The facts of this case appear to be as follows:—In 1875, the plaintiff-respondent, Kura Mal, advanced a sum of money to Bahal, the now answering defendant, upon the security of certain property, of which the mortgagee was to have possession. This not having been given, Kura Mal instituted a suit on the 22nd November 1875 for recovery of the amount of money lent by him. On the 25th of the same month, in consequence of information received by him to the effect that Bahal was about to convey a portion of his property, which would be available for execution should he succeed in his suit, Kura Mal caused a notice to issue, under s. 81 of Act VIII of 1859, to Bahal directing him not to transfer any of his property. This notice was duly served on the 29th November 1875, but on the 1st December immediately following Bahal executed a deed of sale to Batul-un-nissa, the wife of Tawangar Ali, the defendant-respondent. Kura Mal's suit against Bahal was dismissed by both the lower Courts, but on appeal to this Court his claim was decreed on the 7th August 1876. In execution he brought to sale a grove, which realized Rs. 238, and

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some bullocks, which fetched Rs. 127, but this left Rs. 1,219 of the decretal amount still unsatisfied, and this he now seeks to realize by the present suit, brought on the 1st July 1879, by voiding the deed of sale of 1st December 1875, on the ground that it was fraudulent and without consideration. Both the lower Courts decided in his favour and decreed his claim. The defendant appealed to this Court, and at the first hearing before us it was contended by Mr. Colvin, his counsel, that the suit was barred by limitation, in that art. 91, sch. ii of Act XV of 1877, provides that suits of such a character must be brought within three years from the date when "the facts entitling the plaintiff to have an instrument cancelled or set aside became known to him," and that it was clear in the present case the plaintiff knew such facts before the end of 1875. We thought it right to remand an issue, under s. 566 of Act X of 1877, to the lower appellate Court for it to determine when the plaintiff actually did know the facts as to the fraudulent character of the deed of sale of 1st December 1875. The Judge has now returned to us a finding that the plaintiff Kura Mal was aware of them "as early as the 11th December 1875." But it is urged on his behalf that, though he had knowledge of them at that time, he was not in a position to take advantage of such knowledge, by the institution of a suit, until after the 7th August 1876, when this Court gave him a decree upon which execution could issue, and after the sale of the grove and bullocks in execution of that decree, when it became apparent that there was no other property available for the realization of the balance still remaining due but the land to which the present suit refers. This view was adopted by the lower Courts and upon consideration we are not disposed to dissent from it. We think that the words "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him" must be construed to mean, when, having knowledge of such facts, a cause of action has accrued to him and he is in a position to maintain a suit. In 1875, when he sued upon his mortgage, "*non constat*" but that he might fail, or, if successful, that there might have been property of his judgment-debtor sufficient to satisfy his claim. Until the result was known of the former sale in execution of this decree of the Court, it is difficult

to see what "*locus standi*" he could have had in any Court to ask to have the deed of sale set aside. Under these circumstances we are of opinion that the decisions of the lower Courts should be maintained and that this appeal should be dismissed with costs.

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Appeal dismissed.

FULL BENCH.

1881
January 14.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,
Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

BHAGWAN SINGH AND ANOTHER (DEFENDANTS) v. KHUDA BAKHSH
AND ANOTHER (PLAINTIFFS).*

*Refusal to register on ground of denial of execution—Suit for registration—
Act III of 1877 (Registration Act), ss. 71, 73, 77.*

A Sub-Registrar refused to register a bond as the obligor denied the execution of it. The obligee, instead of applying to the Registrar under s. 73 of the Registration Act, in order to establish his right to have such bond registered, sued the obligor claiming a decree directing the registration of such bond. *Held* that such suit was not maintainable.

Ram Ghulam v. Chotey Lal (1) observed upon.

On the 26th April 1879, the defendants in this suit gave the plaintiffs a bond for the payment of Rs. 213-13-0, together with interest at two per cent. per mensem, within two months, in which they hypothecated certain immoveable property as collateral security for the payment of such moneys. On the 26th June 1879, the plaintiffs presented this bond for registration, praying that the defendants, who had refused to appear at the registration office, might be required to do so, under the provisions of s. 36 of Act III of 1877. The defendants were accordingly required to appear and did so, and denied the execution of the bond, and the Registering Officer, the Sub-Registrar, on the 25th July 1879, refused to register it. On the 29th August 1879, the plaintiffs brought the present suit against the defendants in which they claimed the

* Second Appeal, No. 540 of 1880, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 5th March 1880, affirming a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 16th December 1879.

(1) I. L. R., 2 All., 46.

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registration of the bond. The defendants set up as a defence to the suit that the plaintiffs should have applied to the Registrar, under s. 73 of Act III of 1877, to establish their right to have the bond registered, and until they had done so, and the Registrar had refused to register it, a suit for a decree directing its registration could not be maintained. The Court of first instance, relying on *Ram Ghulam v. Chotey Lal* (1), disallowed this contention, and gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court also disallowed the contention. The defendants appealed to the High Court, again contending that the plaintiffs should have followed the procedure provided in Act III of 1877 in cases of refusal to register, and that, until they had done so and failed to obtain registration, the suit was not maintainable. The appeal came for hearing before PEARSON, J., and STRAIGHT, J., who referred it to the Full Bench for disposal.

The Senior Government Pleader (*Lala Juala Prasad*) and Munshi *Hanuman Prasad* for the appellants.

Mr. *Amir-ud-din* for the respondents.

The following judgment was delivered by the Full Bench :—

JUDGMENT.—This is a reference to the Full Bench by Pearson and Straight, JJ., the question being whether the plaintiffs' suit is barred by the provisions of the Registration Act of 1877. The relief asked in the plaint is that a decree be passed directing registration of the bond for Rs. 213-13-0 executed by the defendants in favour of the plaintiffs on the 26th April 1879. It is admitted that the plaintiffs presented the instrument for registration to the Sub-Registrar on the 26th June 1879, and that after some inquiry and nearly a month's delay he refused to register it on the ground of denial of execution by the obligors. Thereupon the plaintiffs, instead of taking any further steps under the Registration Act and applying to the Registrar in accordance with the provisions of s. 73, instituted the present suit on the 29th August 1879. Both the lower Courts have decreed the claim, and the defendants now appeal to this Court. Their conduct has

(1) I. L. R., 2 All., 46.

been disgraceful, and we regret to find ourselves constrained by the plain language of the law to admit the validity of their objections. But it appears to us that we have no other alternative. The plaintiffs' suit is not for specific performance of a contract, but distinctly contemplates and asks for the relief that would be prayed in a suit regularly brought in accordance with the terms of s. 77 of the Registration Act. But unfortunately for him he has failed to satisfy all the conditions precedent to the bringing such a suit, by omitting to make the application to the Registrar provided for by s. 73. For be it observed that the suit mentioned in s. 77 may be instituted "where the Registrar refuses to order the document to be registered," and it is also an incident not unworthy of notice that special provision is made at the end of the section, permitting the unregistered document, the admission of which in evidence could otherwise not be allowed, admissible for the purposes of such suit. In having failed to fulfil all the necessary preliminaries the plaintiff has put it out of the power of the Civil Courts to give him the relief he asks. To decree the prayer of his plaint in terms would be to direct a public officer to do that which he is specifically and plainly told not to do. For the last paragraph of s. 71 says: "No registering officer shall accept for registration a document endorsed 'registration refused' unless and until, under the provisions hereinafter contained, the document is directed to be registered." The plaintiff has not complied with the "provisions hereinafter contained" in that he made no application to the Registrar under s. 73, which, as has already been pointed out, was a condition precedent to the institution of a suit. The defendants' pleas in appeal must therefore prevail, and the appeal being decreed the plaintiffs' claim must fail. We may add that we shall make no order as to costs, as also that the case of *Ram Ghulam v. Chotey Lal* (1) referred to by the Judge is distinguishable in many ways from the present case, and has in our opinion no application to the suit now before us.

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Appeal allowed.

(1) I. L. R., 2 All., 46.

APPELLATE CIVIL.

1881
January 21.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JHUNNA KUAR (PLAINTIFF) *v.* CHAIN SUKH AND ANOTHER
(DEFENDANTS)*.

Partition—Hindu Widow—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 108, 113, 114—Reversioners.

A childless Hindu widow, who has succeeded to her deceased husband's share of a mahál, such share having been his separate property, and is recorded as a co-sharer of such mahál, is as much entitled, under s. 108 of Act XIX of 1873, as any other recorded co-sharer is, to claim a perfect partition of her share. The circumstance that she may after partition alienate her share, contrary to Hindu law, will not bar her right as a co-sharer to partition. If she acts contrary to the Hindu law in respect of her share, the reversioners will be at liberty to protect their own interests.

THE appellant in this case was the recorded co-sharer of a certain village, and had applied for partition of her share. The respondents, the other recorded co-sharers, and brothers of the appellant's deceased husband, Kishore Chand, objected to this application, their objection raising the question of the appellant's right to claim the partition. The Collector decided that the appellant was not entitled to claim the partition. The appellant appealed from the Collector's decision to the District Court, and, on the same being affirmed, she appealed to the High Court. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Kashi Prasad for the appellant.

Pandit Ajudhia Nath and Babu Jogindro Nath for the respondents.

The judgment of the Court (PEARSON, J., and SPANKIE, J.) was delivered by

SPANKIE, J.—The facts are clearly stated by the lower appellate Court. The record of procedure in the Revenue Court discloses carelessness and irregularities, more or less grave. The petition of the plaintiff-appellant asking for partition was presented to the

* Second Appeal, No. 797 of 1880, from a decree of W. C. Turner, Esq., Judge of Agra, dated the 5th May 1880, affirming a decree of A. J. Lawrence, Esq., Collector of Agra, dated the 13th December 1879.

Collector, who probably sent it to the Assistant Collector, though there is no order to that effect. The inquiry was commenced by the Assistant Collector; the issues were drawn and evidence was heard by him. For some reason or other not explained, the record got back to the Collector, who examined the patwari and pronounced judgment in the following terms:—"This village is a zamindari village: objectors say that the property is *maurusi*, and the applicant, having no issue, will by partition be able to dispose of her property: dismissed." Having regard to the fact that the Assistant Collector acted under s. 113 of Act XIX of 1873, and proposed to determine the nature and extent of the applicant's interest in the estate, we must accept the Collector's dismissal of the application for partition as a decision of a Court of Civil Judicature of first instance appealable to the District Court; and, as no exception appears to have been taken to the procedure, we must be content to let the decision, if it can be called one, stand.

From a note at the bottom of his order, it would seem that the Collector was guided by the precedent of this Court—*Bhoop Singh v. Phool Kower* (1)—which ruled that the proprietary right to a share in an undivided estate, which includes and carries with it a right to claim and enforce a partition of that share, must be a right of absolute and unlimited nature, and does not belong to a Hindu widow who has been placed in possession of her deceased husband's share for her maintenance. Consequently, where the widow is not an absolute proprietor but simply an assignee of the profits for her maintenance, she cannot claim partition of the share so assigned. But in the case before us the lady is not in the position of an assignee of the profits for her maintenance. Kishore Chand, the recorded proprietor and lambardar of the village, on the 26th January 1864, applied to the Collector to record himself as the owner of a one-third and his two brothers, Chain Sukh and Salig Ram, as owners of a two-thirds in equal shares. Mutation of names followed. On the death of Kishore Chand in July 1871, the plaintiff, his widow, was recorded as proprietor in his stead, and at her request Chain Sukh was appointed lambardar, and she left

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(1) N.-W. P. H. C. Rep., 1867, p. 368.

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on record that at her decease her brothers-in-law would succeed to her share (*malik hain*). These are admitted facts, and show that the plaintiff succeeded as heir of her deceased husband to a one-third share in the whole estate; and, though there has been no division by metes and bounds, that share is defined and separate. Chain Sukh and Salig Ram, defendants, cannot inherit it until the death of Kishore Chand's widow, the plaintiff. She is in possession by inheritance and not as an assignee of the profits of the share for her maintenance; and, as a recorded co-sharer in the mahál, she, under the terms of s. 108 of the Land Revenue Act, is as much entitled as any other recorded shareholder would be to claim a perfect partition of her share. The circumstance that she might afterwards alienate her property contrary to the Hindu law, would not bar her right as a co-sharer to partition. If she acted in regard to the property contrary to the Hindu law, those persons who are reversioners would be at liberty to protect their own interests.

In appeal the plaintiff urged this view of the case before the District Court. The lower appellate Court also appears to have been misled by the decision of this Court. The Judge has also overlooked the now established law that a division by metes and bounds is not necessary to constitute partition under the Mitakshara. Two conditions, however, are absolutely necessary. The shares must be defined, and there must be distinct and independent enjoyment of those shares. These conditions exist, it is admitted, in the present case. The mere circumstance that the widow admits that, upon her death, her brothers-in-law will be the owners, and the evidence of the patwári that there was commensality between the three brothers in Kishore Chand's lifetime, will not alter the position. The reference by the Judge to a decision of the Sudder Dewany Adawlut—*Khuman Singh v. Narayan Singh* (1)—as to village custom permitting a widow to retain her husband's share for life, the co-sharers being assured that, on her death, the share would come to them, is, as the other decision, inapplicable to the present case. The rule that conditions in village administration-papers purporting to interfere with or alter the ordinary rules of

(1) N.-W. P. S. D. A. Rep., 1860, p. 658.

descent will not be enforced [*Sarupi v. Mukh Ram* (1)] will not apply here. No violence is offered to the Hindu law if a widow recorded and in possession of her deceased husband's separate share claims partition. The decision, therefore, on which the lower appellate Court relies and cites does not support its judgment. The right to partition is allowed by law, and the condition of the administration-paper that sharers are entitled to partition is in accordance with the law. It appears further that appellant in 1879 obtained a decree for her share of the profits. All the facts of the case are such that it is quite unnecessary to remand the case for any further inquiry. We must reverse the decree of the lower appellate Court, including that of the Court of first instance, with costs, declaring in favour of the appellant that she is a co-sharer in the mahál to the extent of one-third, and that she is entitled, under the provisions of s. 108 of Act XIX of 1873, to obtain the perfect partition of her share.

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Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

BALMAKUND v. JANKI AND ANOTHER.*

Custody of Minor—Minor Wife—Act IX of 1861.

1881

January 24.

Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court.

ONE Balmakund applied to the District Court of Benares, under Act IX of 1861, for the custody of a minor girl on the ground that she was his wife. This application was opposed by the minor's mother, Janki, and by one Jangli, on the ground that the minor was not the wife of the applicant, but, on the contrary, was the wife of Jangli. The District Court, holding that there was no proof that the minor was the wife of the applicant, while there was proof that she was living with Jangli as his wife, rejected the application.

* First Appeal, No. 134 of 1880, from an order of M. Brodhurst, Esq., Judge of Benares, dated the 13th August 1880.

(1) N.W. P. H. C. Rep., 1870, p. 227.

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Balmakund appealed to the High Court from the District Court's order, contending that it was proved that the minor was his wife.

Lala Jokhu Lal for the appellant.

Munshi *Hanuman Prasad* for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.) delivered the following judgment:—

OLDFIELD, J.—Act IX of 1861 does not apply to a case of this kind, where the appellant asserts his right to the custody of the respondent on the ground that she is his wife, and the latter denies that she is so. The applicant's course is to establish his claim in a Civil Court by regular suit. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1880

April 19.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA v. HAIT RAM.

EMPRESS OF INDIA v. CHEDA KHAN.

Illicit possession of liquor—Guilty knowledge—Presumption—Act XI of 1870, s. 2—Act X of 1871 (Excise Act), ss. 19, 63—"Ser."

Held, in a prosecution under ss. 19 and 63 of Act X of 1871, that the definition of "ser" given in s. 2 of Act XI of 1870 was not so intelligible and clear as to be capable of general application and that it did not supersede the local customary weight of a ser. *Held*, therefore, the local customary weight of a ser being ninety-five tolahs (the Government ser weighing eighty tolahs), and the accused having been found in possession of ninety-six tolahs only, that the excess of one tolah over the local weight was not such as to warrant the presumption of the guilt of the accused (1).

THESE were appeals by the Local Government from judgments of acquittal passed by Mr. W. Tyrrell, Sessions Judge of Bareilly, dated the 10th and the 27th September 1879, respectively. One Hait Ram and Cheda Khan his servant were convicted by Mr. R. G. Hardy, exercising the powers of a Magistrate of the

(1) Reported under the orders of the Hon'ble the Chief Justice. Since this decision was given a Bill (Excise Act, 1881) has been introduced into the Legislative Council by which it is proposed to alter the excise law, and, among other things, to define more clearly the weight of the "ser" as meaning eighty tolahs.

first class in the Pilibhit district, of an offence under s. 63 of the Excise Act of 1871, in that, not being licensed manufacturers or vendors, or persons duly authorized to supply licensed vendors, they had in their possession one and a quarter sers of country spirits, being a larger quantity than might legally be sold by retail under the provisions of s. 19 of that Act, viz., one ser. The Magistrate, in trying the case, apparently took the "ser" in Act X of 1871 to mean the Government ser of eighty tolahs. On appeal by Hait Ram, the Sessions Judge on the 10th September 1879 acquitted him, on the ground that, as the quantity of liquor in his possession was only one tolah in excess of the Bareilly ser, which contained ninety-five tolahs, and that ser was in practice frequently used in the weightment of liquor and was accepted as a proper ser, the liquor was so very nearly a ser that it was not proper to assume that he was knowingly in possession of an illegal excess quantity. For the same reasons the Sessions Judge, on appeal, acquitted Cheda Khan on the 27th September 1879.

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The Local Government appealed on the same grounds in both cases, such grounds being (i) that the ser mentioned in Act X of 1871 was the Government ser of eighty tolahs, and, inasmuch as the quantity of liquor found in the possession of the accused persons weighed nearly ninety-six tolahs, the accused persons were clearly guilty of the offence charged against them; and (ii) that it was not necessary to prove guilty knowledge as laid down by the Sessions Judge, the fact of possession of an illegal quantity being sufficient to justify a conviction under the Excise Act.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the Crown.

The respondents did not appear.

The following judgments were delivered by the Court:—

STUART, C.J.—The order of the Judge is clearly right and we must dismiss this appeal. It is not only an unsustainable but an unreasonable appeal, for it is based on a very strange law, and one still more strangely expressed, and which I must be allowed to say the people of this country cannot understand, showing thus a limit to the aphorism *ignorantia juris neminem excusat*. The accused are

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Hait Ram, who keeps a liquor shop, and Cheda Khan, his servant, and they were both convicted under s. 63 of the Excise Act, which provides:—"Every person, other than a licensed manufacturer or vendor, or a person duly authorized to supply licensed vendors, who has in his possession any larger quantity of country spirits, or *tári*, or *pachwái*, or intoxicating drugs, except opium, than may legally be sold by retail under the provisions of s. 19,"—and by s. 19 it is enacted that the quantity of country liquor unlicensed vendors may sell shall not be more than "one ser." The two accused were convicted of being illegally possessed of more than one ser of country spirits; Cheda being sentenced to imprisonment for three months, and to pay a fine of Rs. 10, or in default to suffer one month's imprisonment in the civil jail, and Hait Ram to one month's imprisonment in the civil jail, and to pay a fine of Rs. 100, or suffer two months' imprisonment in the civil jail in default. These sentences appear to be warranted by s. 76 of the Excise Act X of 1871. On appeal to the Judge the convictions of the two accused and the sentences on them were annulled. In his judgment the Judge states that a ser of the Bareilly weighment, which he says in practice is frequently used in weighment of spirits and is accepted as a proper ser, contains nearly ninety-five tolahs, while the quantity traced to the accused was found to be as nearly as possible ninety-six tolahs of the *sirkári* or Government weight. In regard to this fact the Judge says that the quantity of liquor found on Cheda (and for which both the accused must be taken to be responsible) was so very nearly a ser that it was improper to assume that he was guilty and that he knew that he was possessed of an illegal excess quantity of the spirits. Against this judgment the Government appealed to this Court on grounds the principal of which is that the ser mentioned in the Excise Act is the Government ser of eighty tolahs, which was of course materially less than ninety-six tolahs, which the accused were responsible for. It becomes material, therefore, to know whether the Government ser was eighty tolahs. The Judge tells us that in his opinion the Bareilly ser containing nearly ninety-five tolahs was the proper measurement, while it is contended on behalf of the Government that the ser is the standard of weight mentioned in s. 2, Act XI of 1870, and which it is there provided "shall be a weight of

metal in the possession of the Government of India, which weight, when weighed in a vacuum, is equal to the weight known in France as the "*Kilogramme des Archives*." Now I would really beg to ask how the natives of this country can be expected to understand such language, and to be informed by it of the exact weightment in tolahs of a ser? It was explained at the hearing that the difficulty had certainly been experienced, and it has been endeavoured to be met by the assumption, which to some extent had been acted on, that the Government ser was eighty tolahs, and that it had been found convenient that the tolah should be considered of the weight of one rupee. Now all this may be very well, but is it reasonable to hold that the convictions and sentences in these cases can be upheld under such a state of the law? I think not. The practical view of the matter taken by the Judge based on the ascertained weight of the ser of the district of Bareilly, where the alleged offence was committed, is reasonable and tangible, and so much cannot be said of the calculation based on the French admeasurement and in the French language as provided by s. 2 of Act XI of 1870.

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The appeals must, therefore, be dismissed, but it is not to be regretted that they have been brought before this Court if their decision will direct the attention of the Government and the Legislature to the very unsatisfactory state of the law, especially as provided by Act XI of 1870, with reference to which they have been considered by us.

STRAIGHT, J.—I am of opinion that the Sessions Judge was right in quashing the convictions of Cheda Khan and Hait Ram, and that the evidence was unsatisfactory and insufficient to sustain the charge against them of being in illegal possession of a larger quantity of country-made spirits than one ser. In cases of this kind it is necessary to establish guilty knowledge, and no doubt the presumption of it may be inferred with more or less force from the mere fact of possession, according as the quantity of liquor found with the person charged is to a larger or smaller extent in excess of the quantity defined in ss. 19 and 63, Act X of 1871. No doubt cases might arise in which from surrounding and collateral circumstances a conviction might be had, where but a

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few tolahs of liquor beyond the legitimate ser are found in a person's possession. But in the present instance there was no such evidence, and the Judge very reasonably argues that the Bareilly ser being about ninety-five tolahs and the liquor discovered in Cheda Khan's possession only weighing ninety-six, the presumption of guilty knowledge should not be drawn. It is not very clear what is the precise weight intended by the expression "one ser" as mentioned in s. 19 of the Excise Act. I think it would be reasonable to assume that it contemplated the ordinary and generally accepted ser of eighty tolahs, or, in other words, the weight of eighty rupees. It seems to me that this is a more comprehensible standard of weight by which to be guided and certainly one much more likely to be understood by the natives of this country than the "*Kilogramme des Archives*" referred to in s. 2 of Act XI of 1870. I am unaware whether this last-mentioned Act, though it has become law, has been put into practical operation, and whether the authorizations, notifications, and rules to be made under it by the Governor-General in Council have ever been issued. Under any circumstances it would seem to me expedient that for the purpose of working the penal provisions of the Excise Act as to the possession of liquor, the weight of the ser therein mentioned should be statutably defined. The appeal is dismissed.

Appeals dismissed.

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 January 4.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BEHARI LAL (PLAINTIFF) v. BENI LAL (DEFENDANT).*

Mortgage—Foreclosure—Demand for payment of mortgage-debt—Power of a minor to take a mortgage—Regulation XVII of 1806, s. 8.

A conditional mortgagee applied for foreclosure, omitting previously to demand from the mortgagor payment of the mortgage-debt. On foreclosure of the mortgage he sued for possession of the mortgaged property. The lower appellate Court dismissed the suit on the ground that the foreclosure proceedings were invalid and ineffective by reason of such omission, and in so doing directed that the demand which the mortgagee should make prior to a fresh application for foreclosure should be limited to a certain amount.

* Second Appeal, No. 1208 of 1879, from a decree of P. White, Esq., Deputy Commissioner of Jalaun, dated the 11th June 1879, reversing a decree of Munshi Kalka Prasad, Tahsildar of Jalaun, dated the 16th December 1878.

Held that the foreclosure proceedings were invalid and ineffective by reason of such omission and the suit had been properly dismissed; and that it was not competent for the lower appellate Court to put any limitation on the amount to be demanded by the mortgagee prior to a fresh application for foreclosure.

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Observations by STUART, C.J., on the competency of a minor to take a mortgage.

THIS was a suit for possession of 1-anna share of a certain village. On the 30th December 1873, one Mata, the proprietor of this share, executed a deed of conditional sale of it in favour of Behari Lal, a minor, on whose behalf the present suit was instituted by his mother. The term of the conditional sale expired on the 1st May 1874. On the 13th December 1874, Mata died, leaving a minor son, Beni Lal, the defendant in the present suit. At his death nothing had been paid on account of the mortgage-debt. On the 26th April 1876, an application was made on behalf of Behari Lal for foreclosure of the conditional sale. This application did not state that payment of the mortgage-money had been demanded, but merely stated that the term of the conditional sale had expired and nothing had been paid. Notice of foreclosure was served on the 16th May 1876 on Beni Lal's mother, the amount claimed being Rs. 289-9-0, being Rs. 181 principal and Rs. 108-9-0 interest. The money not having been desposited within the year of grace, the present suit was instituted on the 3rd September 1878. The Court of first instance gave the plaintiff a decree for possession of the property. On appeal by the defendant it was contended that the conditional sale was invalid, having been made to a minor, and that the foreclosure proceedings were invalid, as no demand for the mortgage-money had been made as required by law previously to the application for foreclosure. The lower appellate Court held that the conditional sale could not be repudiated because it had been made to a minor; and that the foreclosure proceedings were invalid, as no demand for the payment of the mortgage-money had been made previously to the application for foreclosure. It directed that, on fresh proceedings for foreclosure being taken, interest should not be claimed after the death of Mata. The material portion of its decision was as follows:—"As to the foreclosure proceedings, I observe that there is no mention or proof of the debt

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having been fruitlessly demanded before notice was issued: this preliminary is required by the law, and Macpherson's Treatise on Mortgages lays stress upon it as absolutely necessary: the amount claimed in the notice is Rs. 289-9-0, i.e., principal Rs. 181 and interest Rs. 108-9-0, but as I have stated the bond matured on the 1st May 1874, and Mata died on the 13th December following, and yet the plaintiff took no proceedings until now, when his minor son has succeeded to the property: I think in equity no interest should be allowed after the date of Mata's death: the interest up to that date is Rs. 49-1-0, which added to the principal makes the whole amount demandable Rs. 230-1-0: for the omission above indicated, viz., for basing the application for foreclosure simply on the fact that the stipulated date for payment had expired (see petition of 26th April 1876), without asserting or proving unavailing demands for payment, I declare the notice last issued to be void, and that a further notice of the usual one year's grace must, after all due preliminaries, be issued before suit can be brought for making the conditional sale absolute and for obtaining possession: the demand must also be limited to Rs. 230-1-0 as above stated: as Beni Lal is a mere child of some nine years old, the notice can be served on his mother Rajjo in the capacity of natural guardian."

The plaintiff appealed to the High Court, contending that the mere omission to demand payment of the mortgage-money before application for foreclosure was not a ground for reversing the decision of the Court of first instance on the merits of the case; and that the ruling of the lower appellate Court that interest should be limited to a particular period was improper.

Munshi Hanuman Prasad for the appellant.

Lala Latta Prasad for the respondent.

The following judgments were delivered by the Court:—

STRAIGHT, J.—It appears to me that the first ground of appeal has no force. The lower appellate Court finds that no demand for the amount of the mortgage-debt was ever made on the representatives of the mortgagor by the mortgagee, and that there was no

refusal by them to discharge it prior to the issue of the notice of foreclosure. The mere fact that the period limited by the bond had expired without its being satisfied did not absolve the mortgagee from the obligation of making a demand for its payment, and having failed to do so, I think the foreclosure proceedings were ill-founded and should be ineffective. They will therefore have to be recommenced *de novo*, as pointed out by the Deputy Commissioner in his judgment. To this extent therefore it appears to me that this appeal must be dismissed. With regard to the second ground urged by the appellant, I do not think it was competent for the Deputy Commissioner, in decreeing the appeal and therefore dismissing the plaintiff's claim *in toto*, to put any limitation upon the amount to be demanded by him of the mortgagor prior to the issue of fresh notice of foreclosure. The appellant, mortgagee, now stands in the same position as if he had never brought any suit or taken any steps for foreclosure, and he should be at liberty to make any such demand as he may be advised or think proper. If he asks an excessive or incorrect amount, he will do so at risk of a second failure. I therefore think that the appellant's second objection has force, and that the appeal, so far, must be allowed, and the judgment of the lower appellate Court modified, by striking out such portions of it as limit the demand to be made by the plaintiff-appellant on the defendant-respondent to the sum of Rs. 230. In this Court the parties will pay their own costs. In the appellate Court they will be paid as ordered by the Deputy Commissioner.

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STUART, C.J.—Mr. Justice Straight has correctly examined this appeal on its merits, and I approve the order he proposes. But I wish to add a few remarks on a question that was mentioned at the hearing, although it is not made the subject of an objection or plea in cross appeal. This question relates to the capacity of a minor or infant to enter into a mortgage transaction, and briefly stated it is whether in fact a minor can be a mortgagee. As a general rule a minor cannot contract excepting for necessities; but there are numerous cases in the books where the contract of a minor which was clearly beneficial to him was held to be binding. This is on the general principle which is well stated in Chitty's

1881 *Law of Contracts*, 6th edition, by Russell, 1857, p. 147, s. 5, where
 BEHARI LAL it is said:—"It is laid down as a general rule that infancy is a
 v. personal privilege, of which no one can take advantage but the
 BENI LAL. infant himself; and that, therefore, although the contract of the
 infant be voidable, it shall bind the other party; for, being an indul-
 gence which the law allows to infants, to protect and secure them
 from the fraud and imposition of others, it can be intended for their
 benefit only, and is not intended to be extended to relieve those with
 whom they contract from liability on such contracts. Were it
 otherwise, the infant's incapacity, instead of being an advantage
 to him, might in many cases turn greatly to his detriment." Now
 on the just and reasonable principle thus clearly stated where a
 minor lends money, or is the party to whom a mortgage is taken,
 on terms advantageous to him, it would plainly be absurd to listen
 to any plea by his debtor against the validity of the contract on the
 score of the mortgagee's minority. And I observe it has been
 expressly ruled in America that an infant may be a mortgagee, and
 that whether he is the original grantee or takes by descent he is
 bound by the conditions of the deed—Hilliard on Mortgages, 1872,
 vol. 1, p. 17, s. 20. The case is of course different where the
 minor is made the mortgagor, the advantage or disadvantage in that
 case depending on circumstances which cannot be appreciated or
 taken into account at the commencement of such transaction, and
 the law allows a minor as mortgagor, or as a party to any other
 contract where he is made the obligor, a period of three years
 after his coming of age in order that he may determine for himself
 whether he will confirm or repudiate the contract. Whether where
 he repudiates a Court of Equity would nevertheless step in and
 maintain the contract is a question I need not here discuss. It is
 obvious however that a different principle applies where, as in the
 present case, the infant or minor is simply the acceptor and holder
 of a pecuniary acknowledgment which in his interest it is sought to
 enforce, and which it clearly does not lie in the mouth of his
 debtor to repudiate. Of the validity therefore and binding charac-
 ter of the mortgage in the present case there can be no doubt, and
 the argument that was suggested against it must be disallowed.
 The appeal is dismissed without costs, but the appellant will pay
 the costs decreed against him by the lower appellate Court.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RADHEY TEWARI (PLAINTIFF) v. BUJHA MISR AND ANOTHER
(DEFENDANTS).*

1881

January 4.

*Mortgage—Foreclosure—Notice—“Legal Representative” of Mortgagor—
Regulation XVII of 1806, s. 8.*

The holder of a decree for money does not, merely, because he has attached land belonging to his judgment-debtor while it is subject to a conditional mortgage, become the “legal representative” of the mortgagor within the meaning of s. 8. of Regulation XVII of 1806, and entitled to notice of the foreclosure of such mortgage; neither is the holder of a prior lien on land which is conditionally mortgaged the “legal representative” of the mortgagor and entitled to notice of foreclosure proceedings (1).

THE plaintiff in this suit claimed possession of a 6-pie share of a certain village under a conditional sale which had been foreclosed. He claimed as against the conditional vendor and the persons, Bujha Misr and Thakur Misr, who had purchased such share at a sale in execution of a decree against the conditional vendor. The latter persons alone defended the suit. It appeared that before the 24th July 1876, Bujha Misr and Thakur Misr had obtained a decree for money against the conditional vendor. On that date the conditional sale of such share was made to the plaintiff. On the 20th October 1877, such share was attached in execution of the decree held by Bujha Misr and Thakur Misr. On the 1st May 1878, the plaintiff applied to foreclose the conditional sale of such share under s. 8 of Regulation XVII of 1806. The notice required by that law was served on the conditional vendor on or about the 24th May 1878. The share was put up for sale in execution of the decree held by Bujha Misr and Thakur Misr on the 20th January 1879, and was purchased by them. They set up as a defence to this suit, *inter alia*, that they were entitled to notice of the application for foreclosure, as the share was under attachment in execution of the decree held by them, and that, as such notice had not been served on them, the foreclosure proceedings were invalid, and the suit was not maintainable. The Court of first instance disallowed this contention. The

* Second Appeal, No. 713 of 1880, from a decree of Hakim Rahat Ali Khan, Subordinate Judge of Gorakhpur, dated the 15th May 1880, reversing a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 20th February 1880.

(1) See also *Soobhul Chunder Paul v. Nitya Charn Bysack*, I. L. R., 6 Cal., 663, where it was held that an attaching creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.

1881 lower appellate Court allowed it, having regard to the case of
Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee (1), and
 dismissed the suit.

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BUJHA MISR. On second appeal to the High Court the plaintiff contended that, as the equity of redemption of the share had not vested in the auction-purchasers at the time the application for foreclosure was made, they were not entitled to notice of such application, and the foreclosure proceedings were therefore not invalid by reason that such notice had not been given to them; and the case relied on by the lower appellate Court did not apply.

Lala Lalla Prasad for the appellant.

Shaik Maula Bakhsh for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—The appeal must prevail. The lower appellate Court's opinion that the defendants-respondents who had attached the property in suit, in execution of a simple money-decree which they had obtained on the basis of a simple bond (before the plaintiff, who held a mortgage thereof under a deed of conditional sale, took action under s. 8, Regulation XVII of 1806), and purchased the same during the year of grace, were entitled to receive a notice of the application for foreclosure, and that, because they were not served with such notice, the foreclosure proceedings are defective and invalid, is altogether erroneous and is not supported by the authority of the Privy Council's decision to which the Subordinate Judge has referred—*Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (1). When the foreclosure proceedings commenced, the defendants-respondents were merely judgment-creditors under a simple money-decree who had attached their debtor's property and were not the legal representatives of the latter. It is alleged that the property had been hypothecated as security for the debt by a petition dated 10th July 1871, although the lien was not declared by the decree in execution of which they attached and bought the property. If, for the sake of argument, we assume such to have been the case, we cannot admit that, even as prior lien-holders,

they were the legal representatives of Prag Singh, entitled to redeem the plaintiff's mortgage and to receive a notice of his foreclosure proceedings. All that can be said is that the property in question in the plaintiff's proprietary possession may be subject to that lien. Its validity may be considered when an attempt to enforce it is made. The defendants-respondents purchased eight pies, out of which six are claimed by the plaintiff as the subject of the deed executed in his favour on the 24th July 1876. He does not claim nor does the Court of first instance presumably award to him more than six pies. It is unnecessary to remand the case to the lower appellate Court. Decreeing the appeal with costs, we reverse its decree and restore that of the Munsif of Bansi.

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BUJHA MISHR.*Appeal allowed.**Before Mr. Justice Pearson and Mr. Justice Oldfield.*RUP KISHORE AND ANOTHER (PLAINTIFFS) v. MOHNI AND OTHERS
(DEFENDANTS).*

1881

January 4.

*Bond payable on demand—Limitation—Act IX of 1871 (Limitation Act)—
Act XV of 1877 (Limitation Act), s. 2.*

Act XV of 1877, by making the period of limitation for a suit on a bond payable on demand computable from the date of its execution, has shortened the period of limitation prescribed for such a suit by Act IX of 1871, under which the period was computable from the date of demand. *Held*, therefore, that, under the provisions of s. 2 of Act XV of 1877, a suit on such a bond executed on the 14th December 1869, having been brought within two years from the date that Act came into force, was within time.

THE plaintiffs in this suit claimed Rs. 590-6-9, being the principal amount and interest due on a registered bond, dated the 14th December 1869, payable on demand, in which certain immoveable property was hypothecated as collateral security. The plaintiffs claimed a decree directing the sale of the hypothecated property, and, in case that property was not sufficient to satisfy the judgment-debt, directing payment of the judgment-debt by the legal representatives of the deceased obligor and by the

* Second Appeal, No. 714 of 1880, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 6th April 1880, affirming a decree of Maulvi Anwar Husain, Munsif of the environs of Moradabad, dated the 30th September 1879.

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surviving obligor, defendants, and the sale of the other property of the deceased obligor and of the surviving obligor. The suit was instituted on the 29th August 1879. Both the lower Courts held that the claim of the plaintiffs could not be enforced against the defendants personally, as the suit in that respect was barred by limitation; the lower appellate Court disallowing the contention of the plaintiffs that, under the provisions of s. 2 of Act XV of 1877, they were entitled to bring the suit within two years from the date on which that Act came into force, viz., the 1st October 1877.

On second appeal to the High Court the plaintiffs again raised the same contention as they had raised in the lower appellate Court.

Munshi *Sukh Ram* and Babu *Jogindro Nath Chaudhri* for the appellants.

The respondents did not appear.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The question before us is one of limitation. The bond on which the suit is brought was executed before Act XV of 1877 came into force. Under Act IX of 1871 the period of limitation prescribed would be three years running from the date of demand, but under art. 67, sch. ii of Act XV of 1877, it is three years from the date of executing the bond, and the suit for enforcement of the claim against the person and un-hypothecated property of the defendant will be beyond time. The plaintiff contends that under the provisions of s. 2 of the Act he can bring the suit within two years from 1st October 1877, when the Act came into force. The contention is valid. The plaintiff is entitled to the benefit of s. 2 if it be shown that the period of limitation prescribed by Act XV of 1877 is shorter than that prescribed by Act IX of 1871, and this is the case; for although the period of three years is allowed by both Acts, by the old Act it was prescribed for a suit of this character to begin to run from the date of demand, whereas by Act XV of 1877 it will begin to run from the date of execution of the bond, and the period of limitation

prescribed for the suit has thus in effect been shortened. The words "period of limitation prescribed for a suit" in s. 2 do not refer only to the entries in column 2 of the schedules of the period of limitation, but to those entries taken in connection with the entries in column 3 of the time when the period begins to run, since the two together prescribe the period of limitation for a suit; no period of limitation can be ascertained and applied to a particular suit except by considering both entries. The same words "period of limitation prescribed for a suit" occur in s. 4, and the way they are used shows that they are to be understood in the above sense. That section provides that a suit "instituted after the period of limitation prescribed therefor by the second schedule" shall be dismissed, and obviously it is only by taking into consideration the period and the time when it begins to run that the period of limitation prescribed for the suit can be ascertained, so as to allow of a determination whether the suit has been instituted after the period of limitation prescribed. The obvious intention of the Legislature was to give relief in cases where the alteration of the law has in point of fact deprived a person of the full time for instituting a suit which the old law had allowed him. The appeal will be decreed with costs, and the plaintiff's claim be decreed in full against the person and property of the defendants.

Appeal allowed.

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CIVIL JURISDICTION.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

SARNAM TEWARI AND ANOTHER (DEFENDANTS) v. SAKINA BIBI
(PLAINTIFF).*

*Powers of Revision of the High Court under s. 622 of Act X of 1877
(Civil Procedure Code).*

S instituted a suit against *T* in the Court of an Assistant Collector of the first class, who dismissed the suit. On appeal by *S* the District Court gave her a decree. On second appeal by *T* the High Court held that, as the suit was one of the nature cognizable in a Court of Small Causes, a second appeal would not lie in the case, and dismissed it. *T* thereupon applied to the High

* Application, No. 81B. of 1880, for revision under s. 622 of Act X of 1877 of the decrees of J. W. Power, Esq., Judge of Ghazipur, and of C. Rustamjee, Esq., Assistant Collector of the first class, dated the 10th December 1879 and 30th September 1879, respectively.

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Court to set aside, under the provisions of s. 622 of Act X of 1877, the proceedings of both the lower Courts on the ground that both those Courts had exercised a jurisdiction not vested in them by law. *Held* that the High Court was competent to entertain such application and to quash the proceedings of both the lower Courts, under the provisions of s. 622 of Act X of 1877, and the proceedings of both those Courts should be quashed.

Observations by STUART, C.J., on the powers of revision of the High Court under s. 622 of Act X of 1877.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. A suit had been instituted against the petitioners in the Court of an Assistant Collector of the first class by one Sakina Begam, such suit purporting to be one under s. 93 (a) of Act XVIII of 1873. The Assistant Collector dismissed the suit. On appeal by the plaintiff the District Court gave her a decree. On appeal to the High Court by the defendants, the High Court held, on the 15th June 1880, that no second appeal in the case would lie, as the suit was of the nature cognizable in a Court of Small Causes (1). The present application was thereupon made by the defendants, in which they prayed that, as the suit was not cognizable in the Revenue Courts, but one cognizable in the Court of Small Causes, the entire proceedings in the case, that is to say, the proceedings before the Assistant Collector and before the District Court, might be set aside, as having been had without jurisdiction.

Lala Lalta Prasad for the defendants, petitioners.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the plaintiff.

The following judgments were delivered by the High Court:—

STUART, C.J.—This is an application to us by the defendants-appellants under s. 622, Act X of 1877, by which it is prayed that, as the entire proceedings from the institution of the suit to the hearing of the appeal by the Judge were without jurisdiction, they should be quashed and declared null and void. And such appears to me to be the necessary result of our judgment of the 15th June 1880. By that judgment we held that the Revenue Court had no jurisdiction in the case, as it was one exclusively cognizable by the

(1) See *Sarnam Tewari v. Sakina Bibi*, ante p. 37.

Small Cause Court, from whose judgment a second appeal is prohibited by s. 586 of the Procedure Code, Act X of 1877, and the second appeal which has been filed in this Court and which was submitted to us could not be entertained. There was, therefore, 1881
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no suit and no appeal, nor any valid proceeding before us of which we could take notice, the whole record in fact having disappeared by the necessary operation of the self-destructive procedure which had been adopted. Under these circumstances, we might, in my opinion, make the order asked for without reference to s. 622, and simply by our general powers of control under the High Court Act and our Charter. Having regard, however, to the scope and probably intended application of s. 622, I do not consider that we should feel precluded from making this order under its terms, for, in my judgment, it is, our sound judicial policy to make the remedy allowed by s. 622 as wide as possible, and in such a case as the present the order now asked for is, in my opinion, clearly within the spirit and principle, and presumably the intention, of the section, and it would therefore be to defeat its purpose if we refused to apply it. It was argued at the hearing on behalf of the defendants-appellants that we are not driven to set aside the whole proceedings, but that we might, notwithstanding their futility, entertain the case as in second appeal, and in support of this contention the opinions of several of the Judges of this Court delivered in *Maulvi Muhammad v. Syed Husain* (1) were referred to, and there can be no doubt that in certain cases the remedy by second appeal is allowable under s. 622 if the High Court considers that proceeding necessary for the ends of justice. I myself also was of that opinion, but I at the same time held that s. 622 gives us still larger powers of revision in civil cases than we have in second appeals, where we are limited to questions of law arising out of the judgment appealed against. For I considered that under s. 622 we may make any order, whether in regard to fact or law, we may think proper for the purposes of the justice of the case, and I added that the power given to the High Court under s. 622 in civil cases very much resembles, if it is not the same as, the jurisdiction given to the High Court in criminal cases under s. 297 of the Criminal Procedure Code, by which the High Court

(1) I. L. R., 3 All., 203.

1881 is empowered to pass such judgment, sentence, or order as it
 SARNAM thinks fit, the corresponding words in s. 622 being precisely simi-
 TEWARI lar. I am quite clear that we have all this power under s. 622,
 v. although of course the analogy only holds as to cases under s. 622
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 analogy and correspondence seem complete.

It might no doubt be argued that, inasmuch as s. 622 only applies where there is no appeal to the High Court, the object was to confer on the High Court a discretionary power to afford the same kind of remedy by way of appeal as would have been available if the case did not fall under s. 622 by being appealable. But the words appear to me to be too wide to be so limited, for we may make any order, not any order we might make in second appeal, nor even in first appeal, but any order we "think fit," and the chapter of which s. 622 is part is headed "Of reference to and revision by the High Court," and the word "*revision*" is not necessarily limited to matters of form or even to mere questions of law, but includes a general power of control as to everything relating to the suit.

In the present case such a partial proceeding as that by second appeal would be utterly inappropriate if not irrelevant to what has been done. The proceeding by second appeal assumes the existence of a valid record and judgment within jurisdiction, but here there is no such thing, no judgment which we can look at, no "record," no "case," and the Court which assumed to decide it not only had no jurisdiction, but no jurisdiction whatever for any such class of cases. We are not, however, confined by s. 622 to any such partial proceeding, but we may, if we "think fit," make any order we please, and direct anything to be done which we consider called for under the circumstances. Here the whole proceedings before the Assistant Collector and the Judge have disappeared, and there is nothing whatever left on which to base the consideration of the case by the Court in second appeal.

I would, therefore, apply s. 622, Act X of 1877, in the case by granting this application and quashing the whole proceedings below both in the Assistant Collector's Court and in the Judge's

Court *ab initio*, and allowing the plaintiff to present her plaint in the Small Cause Court, the applicant to have the cost of this application.

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STRAIGHT, J.—I concur in substance with the observations of the learned Chief Justice and in his view that we should exercise the powers given to this Court by s. 622 of Act X of 1877 as amended by Act XII of 1879. The opposing party, Sakina Bibi, as zamindar of mauza Bishanpur Piprahi, brought a suit against the applicants defendants in the Revenue Court, to recover the value of half the produce of a grove of mango trees, upon the basis of a contract contained in the *wajib-ul-arz* of 1863. The claim purported to be instituted under clause (a), s. 93 of the Rent Act. It was dismissed by the Assistant Collector for failure of proof, but the Judge on appeal decreed it, and thereupon the defendants, applicants before us, preferred an appeal to this Court, which was heard before the learned Chief Justice and myself. We were of opinion that an objection taken by the then plaintiff-respondent to our jurisdiction to hear the appeal was a fatal one, and that the suit being in the nature of a Small Cause Court case was prohibited from second appeal. We therefore had no alternative but to dismiss the appeal then before us, with the necessary consequence that the judgment of the lower appellate Court remained in force, although we were clearly of opinion that it had no power to take cognizance of the plaintiff's suit. The record, however, of the proceedings before the Assistant Collector and subsequently in the lower appellate Court remained in existence, and upon application formally and properly made under s. 622, this Court, having been moved to do so, by order of Mr. Justice Pearson of the 3rd September 1880, thought proper to call for such record, pertaining as it did to a case in which no second appeal lay, and the plaintiff had notice to show cause why the entire proceedings by her against the defendants-appellants, having been instituted in an original Court and carried to an appeal Court, both without jurisdiction, should not be quashed.

It is admitted on both sides that the plaintiff's claim should have been brought in the Small Cause Court, and that the appeal should have been dismissed by the Judge on the ground that he had no jurisdiction to entertain it. We therefore have before us a

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record in which two Courts have "exercised a jurisdiction not vested in them by law," and I cannot but think that this is just one of those cases in which s. 622 was intended to give us power to put matters right. It would be absurd for us, when our attention has been directed to them, to allow proceedings to continue upon a formal record as having force or effect, when from the commencement to the end they have been carried on in Courts having no jurisdiction. Equally as the Assistant Collector had no power to dismiss the plaintiff's claim, so was it incompetent for the Judge to decree her appeal and give her the relief she asked. It seems to me that s. 622 enables us to entertain and act upon the present application, though I am scarcely as yet prepared to go the length contended for by Mr. Banarji on behalf of the opposite party, that "pass such order in the case as the High Court thinks fit" permits us to exercise an absolute discretion as to the merits of a case, and so in the present instance, if we think substantial justice has been done, allows of our refusing to interfere. I do not consider it possible for us to adopt any such course. The decree which the plaintiff obtained from the lower appellate Court is not worth the paper it is written upon, and no declaration or action of ours could give it vitality or effect. The order therefore will be as proposed by the Chief Justice that the whole of the proceedings in the Revenue and lower appellate Court should be quashed, and we direct that the plaint be returned to Sakina Bibi, the opposing party to this application, for presentation to the Small Cause Court. The appellant must have the costs of this application.

Application allowed.

APPELLATE CIVIL.

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 January 5.

Before Mr. Justice Pearson and Mr. Justice Straight.

NABIRA RAI AND ANOTHER (DEFENDANTS) v. ACHAMPAT RAI
 (PLAINTIFF).*

Occupancy-tenancy—"Immoveable property"—Mortgage—Registration—Act I of 1868 (General Clauses Act), s. 2 (5)—Act III of 1877 (Registration Act), ss. 17, 49.

The obligee of a bond dated the 29th October 1869 sued to recover the amount due thereunder from the property hypothecated therein. By the

* Second Appeal, No. 734 of 1880, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 4th May 1880, modifying a decree of Munshi Kulwant Prasad, Munsif of Rasra, dated the 20th February 1880.

terms of the bond the obligor agreed to pay the sum of Rs. 75 with interest at 2 rupees per cent. per mensem on the 12th May 1873. The amount thus secured exceeded Rs. 200. The property mortgaged was the tenant-holding of the obligor. *Held* that the interest of a tenant in his holding was right or interest to or in immoveable property; that consequently such bond, which affirmed as a security a right of which the value, estimated by the amount secured, exceeded Rs. 100, ought to have been registered; that being unregistered it could not affect the "immoveable property comprised therein," or "be received in evidence of any transaction affecting" the same; and that the suit brought on the basis of such bond, for the enforcement of the lien, must in the absence of the bond fail. *Himmat Singh v. Sewa Ram* (1) followed.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala Latta Prasad for the appellants.

Hanuman Prasad for the respondent.

The following judgment was delivered by the High Court (PEARSON, J., and STRAIGHT, J.):—

PEARSON, J.—This is a suit for the recovery of the amount due under a bond dated 29th October 1869 from the property therein hypothecated. By the terms of the bond the executants thereof agreed to pay the sum of Rs. 75 with interest at 2 per cent. per mensem on the 12th May 1873. The amount thus secured was in excess of Rs. 200. The property mortgaged was the tenant-holdings of the bond-debtors. Referring to the definition of immoveable property contained in the General Clauses Act, we must hold that the interest of a tenant in his holding is right or interest to or in immoveable property; that consequently the bond which affirmed as a security a right of which the value, estimated by the amount secured, exceeded Rs. 100, ought to have been registered; that being unregistered, it cannot affect the "immoveable property comprised therein," or "be received in evidence of any transaction affecting" the same; and that the suit brought on the basis of the bond, for the enforcement of the lien, must in the absence of the bond fail. Therefore, reversing the decrees of the lower Courts, we decree the appeal and dismiss the suit with all costs. In this decision we follow the Full Bench decision in *Himmat Singh v. Sewa Ram* (1).

(1) I. L. R., 3 ALL., 157.

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CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

IMAM-UN-NISSA BIBI (AUCTION-PURCHASER) *v.* LIAKAT HUSAIN
AND OTHERS (JUDGMENT-DEBTORS).*

*Sale in execution—Notice of application for execution—Act X of 1877
(Civil Procedure Code), ss. 248, 311.*

The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the irregularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution-proceedings. *Ramessuri Dassee v. Doorgadass Chatterjee* (1) followed.

Held, therefore, where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877 was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission.

Quære.—Whether such omission was an irregularity in “publishing or conducting” the sale, within the meaning of s. 311 of that Act.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The facts of the case are stated in the judgment of Straight, J.

Mr. Conlan and Munshi Ram Prasad for the petitioner.

Babus Oprokash Chandar Mukarji and Ram Das Chakarbaty for the opposite parties.

The High Court (PEARSON, J., and STRAIGHT, J.) delivered the following judgments:—

STRAIGHT, J.—This is an application for revision under s. 622 of the Civil Procedure Code of an order passed on appeal by the Judge of Allahabad, dated the 30th April 1880, upholding a decision of the Munsif setting aside a sale held in execution of decree on the 20th December 1878, at which the applicant before us, Imam-un-nissa Bibi, became the auction-purchaser. It appears that one Umrit Begam held a decree for some Rs. 27 in respect of

* Application, No. 84B. of 1880, for revision under s. 622 of Act X of 1877 of an order of W. Tyrrell, Esq., Judge of Allahabad, dated the 30th April 1880, affirming an order of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 3rd May 1879.

(1) I. L. R., 6 Cal., 103.

costs against Abu Ali, Liakat Husain, minor, represented by Nasiben Bibi as guardian, and Khairat Husain represented by Budha Bibi as guardian. Before any execution-proceedings were taken upon this decree Abu Ali died, on the 2nd August 1878, leaving his mother Haidri Begam his heiress and legal representative. Shortly after his death Umrit Begam applied for execution of decree, but no notice as required by s. 248 of the Code was given by the Court to Haidri Begam, his legal representative. The property was attached on the 22nd September 1878, and on the 20th of November following sale-notifications were published, the sale being held on the 20th of December, and the present applicant, as before stated, becoming the purchaser at the price of Rs. 30. On the 19th of January 1879, Haidri Begam lodged objections to the sale on the ground that as the legal representative of Abu Ali she had not received the notice provided for by s. 248, and prayed that it might be set aside. The Munsif decided in her favour, and upon appeal the Judge adopted a similar view, being of opinion that not only had inadequacy of price been satisfactorily established, but that the failure to give the notice required by s. 248 rendered the sale-notification so radically bad that there was an "irregularity in publishing the sale," to which the terms of s. 311 would be applicable. A decision of this Court—*Nonidh Singh v. Sohan Kooer* (1)—was referred to by both the lower Courts as being apposite to this view, and it has also been quoted before us as an authority fatal to the maintenance of a sale held under the circumstances disclosed in the present application. There it was held that, when the High Court had passed an order postponing a sale, and such order arrived at the Collector's office the day after the sale, the publication of the sale was irregular as the order postponing it invalidated the notification of sale. It is now contended for the applicant that the failure to give the notice required by s. 248 was not a "material irregularity in publishing or conducting" the sale, and that it was not competent for the lower Courts, in dealing with the validity or otherwise of the sale, in reference to the terms of s. 311, to go so far back in the execution-proceedings as the stage provided for by s. 248. I confess that in the view I take of the matter I should be disposed to regard the circumstances

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(1) N.-W. P. H. C. Rep., 1872, p. 135.

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of this case as outside and beyond the operation of s. 311, and to hold that the sale of the 20th December 1878 could not be sanctioned, the Court executing the decree not having had the power, by reason of certain necessary preliminaries remaining unfulfilled, to issue its warrant for the execution of the decree. While I am not prepared to dissent from the views expressed by the lower Courts as to the applicability of s. 311, it certainly does appear to me that the sale of the 20th of December 1878 was void "*ab initio*" as being held in pursuance of a warrant for execution irregularly and illegally granted against the legal representative of a deceased person, who had had no opportunity of showing cause why it should not be issued. Such a proceeding was as much "*ultra vires*" as it would have been for the Court trying the original suit to pass a decree against a person not a party to it. The provisions of ss. 248 and 249 seem to me peremptorily to require, as a condition precedent to the issue of a warrant for execution of decree, that the legal representative of a deceased judgment-debtor should upon notice duly given have an opportunity of showing cause. Although not as yet published in the authorized reports, there is a decision of the Calcutta High Court (1) by a Division Bench consisting of White and Morris, JJ., which supports the view I have expressed, and treats the failure to give notice under s. 248 as going to the very root, not only of the execution-sale itself, but of the whole proceedings in execution. However, whether the opinion I am inclined to entertain be correct or not, I am certainly not disposed upon this application under s. 622 to disturb the order of the lower Courts setting aside the sale of the 20th December 1878. I would dismiss it with costs.

PEARSON, J.—The opinion expressed by the Calcutta High Court in the case of *Ramessuri Dassee v. Doorgadass Chatterjee* (1), that the omission to give the notice required by s. 248 of the Procedure Code to the judgment-debtor affects the regularity of the sale, and the validity of the entire execution-proceedings, appears to me to be undisputable. I therefore hold that the sale in the present case was rightly set aside by the lower Courts: and I concur with my honourable colleague in dismissing the application which has been preferred to us under s. 622 of the Code with costs.

Application reject. d.

(1) I. L. R., 6 Cal., 103.

APPELLATE CIVIL.

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January 11.*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*JANKI TEWARI AND OTHERS (PLAINTIFFS) v. GAYAN TEWARI
AND ANOTHER (DEFENDANTS).**Filing private award in Court—Order rejecting application—Appeal—Act
X of 1877 (Civil Procedure Code), ss. 2, 525, 526, 540.*

Per SPANKIE, J.—An order refusing an application to file a private award in Court is appealable as a decree. *Jokhun Rai v. Bucho Rai* (1) and *Hussaini Bibi v. Mohsin Khan* (2) impugned and distinguished: *Vishnu Bhau Joshi v. Ravji Bhau Joshi* (3) distinguished.

Per STUART, C.J.—An order refusing an application to file a private award in Court on grounds not mentioned in ss. 520 and 521 is a decree and appealable as such.

THE plaintiffs in this suit claimed under s. 525 of Act X of 1877 that an award might be filed in Court. Nine of the defendants, who were sixteen in number, set up as a defence, *inter alia*, that they had not agreed to refer the matter in dispute on which the award had been made to arbitration, and the award had not been made as against them. The remaining defendants confessed judgment. The Court of first instance decided that the matter in dispute on which the award had been made was one which concerned all the defendants; that the defendants who contested the suit were not parties to the agreement to refer and the award was not made as against them; and that, as all the parties concerned were not parties to the arbitration, the award could not be “executed and enforced”; and it “dismissed the suit.” The plaintiffs appealed, contending that the defendants who contested the suit were parties to the arbitration, and that a decree should have been given to them against the confessing defendants. The lower appellate Court held that the appeal would not lie, relying on the cases which will be found cited below in the judgment of Spankie, J. On second appeal to the High Court the plaintiffs contended that the appeal to the lower appellate Court would lie and the cases relied on by that Court were not applicable.

Mr. Howard for the appellants.

* Second Appeal, No. 464 of 1880, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 18th March 1880, affirming a decree of Munshi Manmohan Lal, Munsif of Balia, dated the 13th December 1879.

(1) N.-W. P. H. C. Rep., 1868, p. 353.

(2) I. L. R., 1 All., 156.

(3) I. L. R., 3 Bom., 18.

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Chatterji for the respondents.

The High Court (STUART, C.J., and SPANKIE, J.) delivered the following judgments:—

SPANKIE, J.—This was an application under s. 525 of the Code of Civil Procedure and was registered as a suit. Nine of the defendants contended, amongst other pleas, that the agreement to arbitrate the dispute between the parties was registered by some, but not by all of those interested; that the award was made nearly five years after the agreement was executed; and that both the agreement and award were in fraud of defendants and the award itself was inconsistent with the agreement. The Munsif admitted the objections of defendants and in his order “dismissed the claim with costs.” The Subordinate Judge in appeal held that there was none from an order rejecting an application to file an award. He cited a Full Bench decision of this Court and other cases:—*Jokhun Rai v. Bucho Rai* (1); *Hussaini Bibi v. Mohsin Khan* (2); *Vishnu Bhau Joshi v. Raoji Bhau Joshi* (3). His judgment is based chiefly on the precedent first quoted, and he remarks that he can see no difference between s. 327, Act VIII of 1859, and s. 525 of Act X of 1877. It is urged in second appeal that the authorities cited by the Subordinate Judge do not apply to the present case, and that the appeal does lie to the Judge, who ought to have disposed of the appeal on the merits. The Full Bench decision of this Court certainly does rule that an order granting or rejecting an application under s. 327, Act VIII of 1859, is not a decree, and that it is not appealable. There is a suggestion in the remarks of the Court that an order granting an application to file an award may become a decree if the parties desire that the award should be incorporated in a judgment. Mr. Justice Pearson dissented from the ruling of the majority of the Court, giving his own opinion separately. But I confess that if Act VIII of 1859 were still in force I should feel doubts now of the propriety of the ruling. It is true that in 1876 Mr. Justice Oldfield and I considered ourselves bound by it—*Hussaini Begam v. Mohsin Khan* (2). The lower appellate Court has cited the case in

(1) N.-W. P. H. C. Rep., 1868, p. 363. (2) I. L. R., 1 All., 156.

(3) I. L. R., 3 Bom., 18.

support of its view. In my judgment there I expressed myself as follows:—"Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award." These remarks would imply that when an application has been refused full relief could be obtained by a regular suit; and that an appeal was unnecessary or undesirable. Since this judgment was delivered Act VIII of 1859 has been repealed and Act X of 1877 now governs our procedure. The lower appellate Court remarks that there is no real difference between s. 327 of the old and s. 525 of the present Code. This doubtless is so, though there is some difference to which I will presently refer, and the purpose of chapter VII of one Code and chapter XXXVII of the other is, in the opening words of the Full Bench decision of this Court, "to render the procedure in matters of arbitration as simple as possible, and to confine within the narrowest limits the power of appeal." But the design of the Legislature was to confine within the narrowest limits an appeal against the award. In s. 326 of Act VIII of 1859, which permitted agreements to refer disputes to arbitration to be filed in Court, it is provided as follows:—"If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference shall be made thereon." The previous provisions of the chapter, so far as they are not inconsistent with the terms of the agreement, are made applicable "to all proceedings under an order of reference made by the Court and to the enforcement of such award." In the corresponding sections of the present Code, 523 and 524, the foregoing provisions of the chapter are similarly made applicable to the award of arbitration and to the enforcement of the *decree* founded thereupon. I particularly refer to the change of the word *decree* in lieu of *award*, because it was a point in the ruling of the Full Bench respecting s. 327 that neither an order granting an application to file an award nor the rejection of such an application were appealable, inasmuch as such orders were not decrees and no appeal was provided for them as orders. In s. 327 it was provided that "if no sufficient cause be shown against the award, the

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award shall be filed, and may be enforced as an award made under the provisions of this chapter." In s. 526 of the present Code it is provided that "if no ground such as is mentioned or referred to in s. 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." Here then though there is no particular difference between ss. 327 and 525 there is a material difference of procedure between the latter portion of ss. 327 and 526. S. 327 of Act VIII of 1859 does not indicate the objections to an award that might be taken. It is enough if sufficient cause be shown. In s. 526 the grounds of objection must be those mentioned or referred to in ss. 520 and 521. Where the objections under s. 520 are sustained an award may be remitted for reconsideration. If they are sustained under s. 521, the award may be set aside. Now in s. 514 provision is made for superseding the arbitration and in s. 518 for modifying or correcting an award. It is noteworthy that under these sections the orders are appealable as such by clauses (25) and (26), s. 588 of the Act, but orders under ss. 520 and 521 are not so appealable. The reason for this would appear to be that under s. 514 no award has yet been made, and under s. 518 the interference of the Court with an award is very limited; there must be no interference with the decision on the matter referred. When however the award has been reconsidered and completed under s. 520, or when objections have been preferred under s. 521 and have been disposed of, it remains for the Court to give *judgment*. So, "if no ground such as is mentioned or referred to in s. 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." We must turn to s. 522 in order to ascertain how effect is given to an award "under the provisions of this chapter." The section runs:—"If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to give judgment according to the award." Upon the judgment so given a decree shall follow, and shall be enforced in manner

provided in the Code for the execution of the decree, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

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Applications alike under ss. 523 and 525 are to be registered as suits. The application to file an agreement under s. 523 is to be made to any Court having jurisdiction in the matter to which the agreement relates; that under s. 525 "to the Court of the lowest grade having jurisdiction over the matter to which the award relates." These words are not to be found in s. 327 of the Act VIII of 1859. The applications alike in ss. 523 and 525 are at *once* to be registered as suits before notice is given to the other side. In this respect they differ from ss. 326 and 327 of Act VIII of 1859, under which notice is given before the application is registered as a suit. This circumstance may seem unimportant, but the difference seems to me to indicate that such applications were really to be dealt with from the moment they were received as suits, and that the orders on the award under them were to have a final character. The procedure adopted, the use of the word decree in s. 524, the mode in which effect is to be given to the award, seem to me to point to distinguish the ultimate orders from those orders appealable under s. 588 of the Code, and bring them under the definition of s. 2 of the Act, wherein decree means the final expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal: an order rejecting a plaint, or directing accounts to be taken, or determining any question referred to in s. 244, but not specified in s. 588, is within the definition. An order rejecting a plaint is appealable as a decree, and in this respect an order rejecting an application to file an award may be regarded as a decree. It *decides* the suit. If the application be granted the suit is similarly decided, and an appeal would lie when the decree was in excess of, or not in accordance with, the award. To that extent appeals under this chapter are confined, when the decree is in accordance with the award. But where the award is allowed to be filed, the order referring it is also a decree, and would be appealable under s. 540 of the Code. Nowhere else is there any express provision to the contrary, therefore

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an appeal is admissible under that section. The Bombay case—*Vishnu Bhau Joshi v. Raaji Bhau Joshi* (1)—cited by the lower appellate Court refers also to s. 327 of Act VIII of 1859, but if I am right in my view as expressed above it, like the Full Bench decision of this Court (2), would not apply to the present case and procedure under Act X of 1877. The learned counsel Mr. Howard in maintaining that an appeal would lie referred us to the case of *Boonjad Mathoor v. Nathoo Shahoo* (3). In that case the application was made under s. 327 of the Code. It was held that the award was not a valid and final award, and that the decree passed thereon was not final and that an appeal would lie. This judgment supports my view of the case now that, where there is an order on the award, the order is a decree and not an order. If the opinion I have formed on the state of the law now since the introduction of Act X of 1877 be correct as observed above, the order granting and the order rejecting an application under s. 525 are alike decrees, and the order rejecting the application is appealable as a decree. I would decree the appeal and remit the case to the lower appellate Court to be tried on its merits. Costs to abide the result.

STUART, C.J.—I am clearly of opinion that the Judge ought to have entertained the appeal which was taken to his Court in this case, and that the authorities to which he refers do not apply. If it was really intended to exclude such an appeal the procedure provided by ss. 525 and 526 should have been carefully followed, and how such plain directions can be misunderstood it is not easy to comprehend. But the present case, although the remedy intended appears to have been that provided by s. 525 and the other sections of the Code which constitute chapter XXXVII, was conducted in this way. A pleading in the form of a plaint was filed, and it prayed that after the necessary requisites of the law have been fulfilled the arbitration award may be ordered to be filed, and that after its being filed it may be duly acted upon, and all this without the least reference to the directions provided by s. 526. In this form the Munsif entertains the case, takes evidence, and ultimately records a judgment dismissing the claim on grounds such as these,—that all the property referred to arbitration had not

(1) I. L. R., 3 Bom., 18. (2) N.-W. P., H. C. Rep., 1868, p. 353.

(3) I. L. R., 3 Cal., 375.

been dealt with in the award, and that the arbitration agreement had not been executed by all the parties named therein. Such having been the procedure adopted for the conduct and disposal of the suit by the Munsif, there was really no case for the application of s. 522, and therefore none for the exclusion of an appeal to the Judge, the Munsif adopting a different line of inquiry from that provided by the Procedure Code for arbitration cases, and giving a decision and order by which he dismissed the claim, and making a "decree" within the meaning of that term as defined by s. 2 of Act X of 1877, for it was clearly an adjudication or order which decided the suit in the form in which it had been taken cognizance of by him, and therefore such an order dismissing the claim was clearly a decree within the meaning of s. 540, and was appealable to the Judge. Under these circumstances the case must go back to the Judge to be restored to his file and to be disposed of on the appeal to him; costs to abide the result.

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Case remanded.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

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KINLOCK (DEFENDANT) v. THE COLLECTOR OF ETAWAH AS MANAGER OF MAUZA SAMAYAN ON BEHALF OF THE COURT OF WARDS (PLAINTIFF).*

January 11.

Rent—Produce of Land—Hypothecation—Purchaser—Act XVIII of 1873 (N.-W.-P. Rent Act), s. 56.

The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by s. 56 of Act XVIII of 1873, takes such produce subject to such lien. S. A. No. 1393 of 1870 decided on the 4th February 1871 (1) and *Achul v. Gunga Pershad* (2) followed.

THE plaintiff in this suit claimed from the cultivators of certain land and one Kinlock, who had purchased at a sale in execution of a decree the produce of such land, Rs. 136-15-0 representing the amount of rent payable in respect of such land by such cultivators for the years 1284 and 1285 Faslī. The plaintiff stated

* Application, No. 77B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 23rd May 1880, affirming a decree of Babu Sanwal Singh, Munsif of Etawah, dated the 2nd September 1879.

(1) Unreported.

(2) N.-W. P., H. C. Rep., 1867, p. 73.

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in support of his claim that, at the time of the attachment and sale of such produce in the execution of such decree, such produce was, by virtue of the provisions of s. 56 of Act XVIII of 1873, hypothecated to him for the payment of Rs.136-15-0, being the rent payable in respect of such land for the years 1284 and 1285 Fasli; that notice was given to the defendant Kinlock, the auction-purchaser, of the plaintiff's lien on such produce; and that the defendant Kinlock had refused on demand made by the plaintiff to satisfy the plaintiff's claim for such rent. The defendant Kinlock set up as a defence as a suit, *inter alia*, that the produce of land in the occupation of a cultivator should be deemed hypothecated to the landholder for the rent payable in respect of such land so long only as such produce remained in possession of the cultivator, and the landholder's lien on such produce could not be enforced after such produce had passed into the hands of a third party. Both the lower Courts disallowed this defence.

The defendant Kinlock thereupon applied to the High Court to revise the decrees of the lower Courts under s. 622 of Act X of 1877, on the ground (i) that the purchase by him at an execution-sale of the produce of a field belonging to a tenant of the plaintiff, who was in arrears as regards rent at the time when such sale took place, gave the plaintiff no cause of action against him, and did not entitle the plaintiff to claim the sum representing such arrears of rent from him; and (ii) that the plaintiff's lien on the produce of such land could not be enforced after such produce had passed into his (defendant's) hands by purchase.

Mr. Conlan for the petitioner.

The Senior Government Pleader (Lala Juala Prasad) for the plaintiff.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—The grounds of appeal are negatived by the rulings in Special Appeal No. 1393 of 1870, decided on the 4th February 1871 (1), and *Achul v. Gunga Pershad* (2). Following those precedents we must hold that, as the *locum tenens* of

(1) Unreported.

(2). N.-W.-P. H. C. Rep., 1867, p. 73.

the ostensible purchaser who purchased the produce in question at auction with notice of the rent incumbrance, or rather as the real purchaser of the produce in the name of Kanhaya, the applicant is liable to the claim which the lower Courts have decreed against him. There is nothing in the judgment of those Courts to countenance the supposition that the aforesaid produce had been stored by the cultivator before it was attached and sold in execution of decree, and was not liable to be distrained. On the contrary those judgments apparently proceed on the assumption that it had not been so stored; nor was it a part of the defence to the suit that it had been so stored. It is unnecessary therefore for us to consider an argument which has been orally urged that the hypothecation created by s. 56 of the Rent Act is merely for the purposes of distress, and does not continue after the produce of the land has ceased to be liable to distraint. The application is disallowed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JAGRANI BIBI AND ANOTHER (PLAINTIFFS) v. GANESHI (DEFENDANT). * 1881
January 18.

Trees—"Land"—*Act I of 1868 (General Clauses Act), s. 2 (5)*—*Title—Act IX of 1871 (Limitation Act), s. 29—Act XV of 1877 (Limitation Act), s. 28.*

Trees growing upon land are "land," within the meaning of s. 29, Act, IX of 1871.

Possession of land by a wrong-doer for twelve years not only extinguishes the title of the rightful owner of such land, but confers a good title on the wrong-doer.

THE plaintiffs in this suit claimed possession of six mango trees of which the defendant had dispossessed them in 1875, setting up a title to them by purchase. The defendant denied the title to the trees set up by the plaintiffs, and alleged that they belonged to him. The Court of first instance held that the plaintiffs had not proved their title to the trees by purchase, but that they had proved that they had been for upwards of twelve years in adverse possession of

* Second Appeal, No. 755 of 1880, from a decree of R. D. Alexander, Esq., Subordinate Judge of Allahabad, dated the 11th June 1880, reversing a decree of Babu Pramoda Charan Banarji, Munsif of Allahabad, dated the 24th January 1880.

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them when they were dispossessed by the defendant, and that they had therefore acquired a title to them at that time, and gave the plaintiffs a decree. On appeal by the defendant the lower appellate Court held, having regard to s. 29 of Act IX of 1871, that the plaintiffs had not acquired a title to the trees by prescription at the time when they were dispossessed by the defendant, as the provisions of that section were only applicable to land, and were not applicable to such property as trees, and that, as they had not acquired a title to the trees by prescription, and had failed to prove the title to them by purchase set up by them, their suit must be dismissed. The plaintiffs appealed to the High Court, contending, *inter alia*, that trees were included in the term "land," and they had acquired a good title to the trees in suit by adverse possession of them for upwards of twelve years.

Lala Latta Prasad and Munshi Kashi Prasad for the appellants.

Babus Barodha Prasad Ghose and Ram Das Chakarbaty for the respondent.

The judgment of the High Court (PEARSON, J., and SPANKIE, J.), so far as it is material for the purposes of this report, was as follows:—

SPANKIE, J.—The Judge appears to have gone wrong in discussing the relative bearing of s. 29, Act IX of 1871, and of s. 28, Act XV of 1877, to the case. The former Act if applicable at all would not have been inapplicable for the reason assigned by the lower appellate Court, that the suit is for trees, and s. 29 refers to lands only and hereditary office. Land comprehends what it covers and would include immoveable property as recognized and defined in s. 2 (5), Act I of 1868. The judgment of the Judicial Committee of the Privy Council in *Gunga Gobind Mundul v. The Collector of 24-Pergunnahs* (1) settled the law, that continuous possession for upwards of twelve years not only bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor. It is remarked in a recent decision of the Presidency Court in *Gossain Dass Chunder v. Issur Chunder Nath* (2) that the

(1) 11 Moore's I. A., 345.

(2) I. L. R., 3 Calc., 224.

construction which the Presidency Court has given to the law laid down by the Privy Council is not only that a twelve years' possession by a wrong-doer extinguishes the title of the rightful owner, but confers a good title on the wrong-doer. The Presidency authority is cited. In the case to which reference is here made the suit was to recover possession of certain rooms in a house, the whole of which the plaintiff admitted once to have belonged to the defendant, but which he says was sold by the defendant to his (plaintiff's) brother in the year 1857 or 1858, and from which the defendant subsequently dispossessed the plaintiff. This suit resembles the one before us as comprehending something less limited than the Judge has allowed to the world land. The plaintiff failed to establish the title on which he based his claim, but he showed that he had been in possession of the property for upwards of twelve years. It was held that, this fact being determined in his favour, the defendant's title was extinguished.

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Before Mr. Justice Pearson and Mr. Justice Straight.

LAL BAHADUR SINGH (PLAINTIFF) v. DURGA SINGH AND OTHERS
(DEFENDANTS). *

1881
January 15.

Pre-emption—Minor—Guardian.

The circumstance that a co-sharer of a village was a minor at the time of the preparation of the *wajib-ul-arz* and that document was not attested on his behalf by a guardian or duly authorized representative is not a reason for excluding him from the benefit of the provisions of that document relating to pre-emption.

The guardian of a minor is competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and the minor is bound by his guardian's act if done in good faith and in his interest.

THE plaintiff in this suit, a minor, sued by his 'next friend, his brother and guardian, Autar Singh, to enforce his right of pre-emption in respect of a certain share in a certain mahál, basing his claim upon an agreement relating to the right of pre-emption which was recorded in the administration-paper of the mahál. That document contained the following entry regarding the right of pre-emption of co-sharers:—"If any of the co-sharers wishes to sell or mortgage

* Second Appeal No. 637 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 2nd March 1880, reversing a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 16th December 1879.

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his share, he shall do so in the first place to his new co-sharer: then to the co-sharers in his thoke: then to the co-sharers in the other thokes: should none of these take the share, he may transfer to a stranger." The share in suit was a share of the thoke in which the plaintiff was a co-sharer. The purchasers of the share, Durga Singh and certain other persons, were strangers. The plaintiff alleged *inter alia*, in support of his claim that the vendor had sold the share without making him an offer of it. The defendants-vendees set up as a defence to the suit, *inter alia*, that the vendor was not bound to offer the share to the plaintiff as he was a minor, and there was no competent guardian of the plaintiff to whom an offer could have been made of the share. The Court of first instance, without deciding the question raised by this defence, gave the plaintiff a decree. On appeal by the defendants-vendees the lower appellate Court disallowed the plaintiff's claim on the ground that he was not a party to the administration-paper and consequently could not claim thereunder. The plaintiff appealed to the High Court. The Division Bench before which the appeal came for hearing (Pearson, J., and Straight, J.,) reversed the decision of the lower appellate Court and remanded the case for the trial of the issue whether, at the time of the sale, there was any person competent as the plaintiff's guardian, to receive and accept or refuse an offer of the share in suit on his behalf. The order of remand was as follows:—

PEARSON, J. (STRAIGHT, J. concurring).—The ground upon which the lower appellate Court has disallowed the plaintiff's claim, *viz.*, that he was a minor at the time of the preparation of the *wajib-ul-arz* which was not attested on his behalf by any guardian or duly authorized representative is, in our opinion, untenable. The vendor of the share in question was bound by the provisions of that document by his contract with the other sharers, if not with the plaintiff, to offer the share to a co-sharer before selling it to a stranger; and it is not denied that the plaintiff is and was even at the time of the preparation of the *wajib-ul-arz* a co-sharer not only in the mahál, but in the very thoke in which the vendor is a sharer. The circumstance that the plaintiff was not a party to the *wajib-ul-arz* is no reason for excluding him from the benefit of the provision which

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was designed to prevent the introduction of strangers into the mahál. By the institution of this suit he has intimated his assent to that provision and will be bound by it in future. The material question for inquiry and determination is whether or not at the time of the sale there was no person competent on behalf of the plaintiff to receive an offer of the share from the vendor. If there was such a person, and presumably the minor was living under some guardianship, the vendor was bound to have made the offer to him. Having regard to the circumstance that the present suit for the enforcement of the plaintiff's pre-emptive right is brought by a person styling himself the plaintiff's guardian, it is not obvious to us why an offer of the share could not have been made to the same person on the plaintiff's behalf at the time of the sale. He may be the *de facto* and under the Hindu Law the *de jure* guardian of the minor. But as the question has not been tried by the lower Courts although raised by Durga Singh's pleadings in both the lower Courts, we think it better to remit it for trial to the lower appellate Court. The question is, as above indicated, whether at the time of the sale there was any person competent as the plaintiff's guardian to receive and accept or refuse an offer of the share in question on his behalf. On submission of the finding, a week will be allowed for objections.

The lower appellate Court found upon the issue remitted that at the time of the sale the plaintiff was living with, and under the care of, his elder brother Autar Singh, who was his natural guardian and as such competent to receive and accept or refuse an offer of the share in suit on his behalf.

On the return of this finding to the Division Bench (PEARSON, J., and STRAIGHT, J.),

Mr. *Spankie* for the defendants-vendees, respondents, contended that the guardian, natural or illegal, of a Hindu minor was not competent to purchase immoveable property on behalf of the minor, and a purchase of immoveable property by him might be repudiated by the minor when he came of age. The guardian cannot therefore assert a right of pre-emption, and if he does the minor may repudiate his acts. It was not intended by the co-sharers in this case that a share should be offered to a person whose authority

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to enter into the contract of purchase might be subsequently questioned, and it was not equitable to compel a co-sharer to make a sale which was liable to be questioned. He referred to Tagore Law Lectures, 1877, Minority (Trevelyan), Lecture X., Powers of Guardians, and *Nubo Kant Doss v. Abdool Juleel* (1).

Munshis *Hanuman Prasad* and *Kashi Prasad* for the appellants.

The Court delivered the following judgment:—

PEARSON, J.—We cannot accept as sound the objections taken by the learned counsel for the respondent Durga Singh to the finding of the lower appellate Court on the question referred to it by our order of the 26th August last. We entertain no doubt that the guardian of a minor is fully competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and that the minor would be bound by his guardian's act if done in good faith and in his interest. Accordingly we decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Straight.

1881
 January 24.

KHURRAM SINGH AND ANOTHER (DEFENDANTS) v. BHAWANI BAKHSH (PLAINTIFF).*

Bond—Interest—Penalty.

A bond for the repayment of money lent provided that such money should be repaid on a certain date; that interest at the rate of Rs. 7-8-0 per cent. per annum should be paid at the end of every year; and that if default were made in the payment of interest, such money should be repaid with interest at the rate of Rs. 37-8-0 per cent. per annum. The bond contained an hypothecation of immoveable property as collateral security. In a suit on the bond of the obligee, the obligor having failed to pay any interest, claimed interest from the date the bond became due to the date of institution of the suit at Rs. 37-8-0, the defaulting rate. *Held*, following the principle laid down in *Bansidhar v. Bu Ali Khan* (2), that the provisions of the bond, as regards the rate of interest payable on default of the payment of interest, were in their nature penal and so excessive that, as a matter of equity, they should not be enforced.

* Second Appeal No. 771 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 16th May 1880, affirming a decree of Munshi Mahabir Prasad, Munsif of Etah, dated the 6th September 1879.

(1) 20 W. R., 372. (2) I. L. R., 3 All., 260.

Held also, with reference to the question what was a reasonable amount of compensation for the obligor to pay for breach of contract, that unpaid interest should bear interest at the rate of Rs. 11-4-0 per cent. per annum from the date of default to the date of the High Court's decree.

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THE plaintiff in this suit claimed to recover Rs. 199, principal, and Rs. 359-13-0, interest, on a registered bond dated the 25th June 1872, in which certain immoveable property was hypothecated as collateral security. It was provided by this bond that the defendants should repay the principal amount within three years, with interest at the rate of Rs. 7-8-0 per cent. per annum, such interest to be payable at the end of each year; and that, if default were made in the payment of interest at the end of any year, the defendants should repay the principal amount with interest at the rate of Rs. 37-8-0 per cent. per annum. The defendants did not pay any interest, and the plaintiff, in claiming interest, calculated it from the 25th June 1872 to the 26th June 1875, the date on which the bond became due, at the stipulated rate of Rs. 7-8-0 per cent. per annum, and from the 27th June 1875 to the 1st August 1879, the date of the institution of the suit, at the defaulting rate of Rs. 37-8-0 per cent. per annum. The defendants pleaded that they had paid the stipulated interest annually, and that they had paid the principal amount in part, but they produced no evidence in support of these pleas. The Court of first instance gave the plaintiff a decree against them for the full amount of his claim, with interest from the date of the institution of the suit to the date of the decree at the stipulated rate, that is to say, Rs. 7-8-0 per cent. directing the sale of the hypothecated property. On appeal by the defendants to the lower appellate Court they contended that the rate of interest payable under the bond in the case of default was a penal rate and should not have been allowed. The lower appellate Court disallowed this contention on the ground that it had not been raised in the Court of first instance.

On appeal to the High Court the defendants again contended that the rate of interest payable in default was in the nature of a penalty and should not be enforced.

Munshi Sukh Ram and Kashi Prasad for the appellant.

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The *Senior Government Pleader* (Lala Juala Prasad) and Munshi Hanuman Prasad for the respondents.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The plaintiff-respondent sues to recover the amount of Rs. 199 and Rs. 359-13-0 interest from the defendants-appellants on the basis of a registered bond, hypothecating certain property, dated the 25th June 1872. By this instrument it was provided that the principal sum was to be repaid in “the course of three years” with interest at the rate of twelve annas per cent. to accrue and become due at the end of each year. Upon default of payment of interest at the end of each year, there was the further provision that “it will be paid at the rate of Rs. 3-2-0 per cent.” or, in other words, Rs. 37-8-0 per cent. per annum. The plaintiff-respondent’s claim in respect of interest was at the defaulting rate and the lower Courts have decreed it in its entirety. The only ground of appeal to us is that the provision of the bond as to the rate of interest to be paid on default is in the nature of a penalty and should not be enforced. In a Full Bench judgment on a reference from the Judge of Aligarh,—*Bansidhar v. Bu Ali Khan* (1),—to which we both were parties, the mode in which the question of penalty or no penalty is to be regarded was discussed, and the views therein expressed, which are apposite to the present case, have undergone no change. They are, we may add, supported by numerous decisions of this Court as also of the Courts of Calcutta and Bombay. It appears to us that, following the authority of this Full Bench case, the terms of the bond involved in this appeal, with regard to the increased interest payable on default, are in their nature penal and so excessive that as a Court of Equity we should not enforce them. The plaintiff’s debt was secured by the hypothecation of the property and the bond pledging it contained a clause against further alienation. We cannot believe it was the intention of the defendants-mortgagors to make themselves liable in a certain event to pay such extravagant interest, such event being the default to satisfy the ordinary interest at the stipulated time and not the failure to repay the

(1) I. L. R., 3 All., 260.

principal sum within the prescribed period of three years. The appeal must be decreed and the decision of the lower appellate Court, in so far as it relates to the interest claimed, be reversed with costs. The defendants-appellants are found to have broken their contract, and the simple question is, what is a reasonable amount of compensation for them to pay? It does not appear to us necessary to remit an issue to the lower appellate Court upon the point for determination, as there is sufficient material before us to enable us to dispose of the matter ourselves. The principal sum of Rs. 199 should, we think, bear interest from the date of the last payment of interest to the date of our decree at the rate of 12 annas per cent. The interest which becoming due and remaining unpaid caused the default should bear interest at the rate of 15 annas per cent. from the date of default to the date of our decree. Thereafter the two amounts so decreed will bear interest at 12 annas per cent.

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Decree modified.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1881
January 24.

RAM NARAIN LAL AND OTHERS (PLAINTIFFS) v. BHAWANI PRASAD
AND ANOTHER (DEFENDANTS).*

Joint Hindu family—Joint family Debt—Sale of joint family property in execution of decree.

When a member of a joint Hindu family is sued for a family debt it may be assumed that he is sued for the same as the representative of the family; and when the decree in such a suit is substantially one in respect of the family debt and against the representatives of the family, such decree may properly be executed against the family property.

Held, therefore (STRAIGHT, J., dissenting), where the father of a joint Hindu family, as the representative of the family, borrowed money, for family purposes, hypothecating family property for the repayment of such money, and in a suit to recover such money by the sale of such property and other family property a decree was made against him directing the sale of the hypothecated property and such other property, and such properties were sold in execution of such decree, that, having regard to these facts, it was reasonable to hold that the father was sued as the representative of the family, and such decree was made against him

* Appeal under cl. 10 of the Letters Patent, No. 2 of 1880.

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in that capacity, and was so executed against him, and consequently his sons were not entitled to recover their legal shares of such properties from the auction-purchaser. *Bissessur Lall Sahoo v. Luchmessur Singh* (1) followed; *Deendyal Lal v. Jugdeep Narain Singh* (2) distinguished.

Per STRAIGHT, J.—That, the father alone having been a party to such suit, and the sons not having been parties thereto either personally or by a formally constituted representative, and such decree being against the father alone, the rights and interest of the sons in the family properties were not affected by the sale of such properties in execution of such decree, and the sons were entitled to recover their legal shares of such properties from the auction-purchaser. *Deendyal Lal v. Jugdeep Narain Singh* (2) followed.

ON the 15th June 1875, Kalandar Lal, a defendant in this suit, gave Bhawani Prasad, also a defendant in this suit, a bond for Rs. 799, payable within two years, in which he hypothecated a two-anna share of a certain village as collateral security, describing such share as his own property. The principal amount of this bond represented the principal amounts and interest due on three bonds which Kalandar Lal had previously given to Bhawani Prasad, dated severally the 7th August 1871, the 10th July 1873, and the 6th June 1874. These amounts the bond of the 15th June 1875 recited, were borrowed by Kalandar Lal for the payment of Government revenue and the maintenance of his children. At the time when the bond of the 15th June 1875 was executed, Kalandar Lal had four sons, three of whom were minors. The bond was witnessed by the fourth and eldest son. Bhawani Prasad brought a suit upon the bond against Kalandar Lal, claiming a decree against him personally and against the two-anna share and his other property, and on the 21st June 1878 obtained a decree against Kalandar Lal as claimed. On the 15th March 1879, two houses were put up for sale in execution of this decree as the property of Kalandar Lal, and such houses were purchased by Bhawani Prasad, the decree-holder. On the 20th March 1879, the two-anna share was put up for sale in execution of the decree as the property of Kalandar Lal, and the same was also purchased by Bhawani Prasad. In April 1879, the sons and grandsons of Kalandar Lal brought the present suit against him and Bhawani Prasad in which they claimed possession of four-fifths of the two-anna share (1 anna 7½ pies) and four-fifths of the houses, and to have the auction-sales of the

(1) 5 Cal. L. R., 477; L. R., 6 Ind. App., 233.

(2) I. L. R., 3 Cal., 198.

15th March and 20th March 1879, respectively, cancelled. They contended that as such property was joint family property, and the debt in satisfaction whereof such property had been sold had been contracted by Kalandar Lal, their father and grandfather, without legal necessity, the sales of such property should be cancelled to the extent of the shares of his four sons. The suit was not defended by Kalandar Lal. The defendant Bhawani Prasad did not deny that such property was joint family property, but contended that Kalandar Lal had contracted the debt in question "in the presence of the plaintiffs and with their consent, to meet the necessity of satisfying former debts and to maintain the family, and the plaintiffs had not raised any objection to the contracting of such debt; and that the claim of the plaintiffs, brought in collusion with their father, the judgment-debtor, should not be allowed after the decree in respect of such debt and the auction-sales had become absolute." The Court of first instance fixed the following issues for trial, *viz.*, "Was the debt in satisfaction of which the property was sold at auction contracted by Kalandar Lal, the judgment debtor, illegally? Should four shares of that property be awarded to the plaintiffs by avoidance of the auction-sales to that extent?" The Court of first instance held in respect of such issues that, inasmuch as the debt had been contracted by Kalandar Lal as the head and manager of a joint Hindu family for necessary purposes, that is to say, for the payment of Government revenue and family wants, and the plaintiffs had shared in the benefits derived from the use of the moneys so borrowed, the plaintiffs were not entitled to recover any portion of the property in suit. On appeal by the plaintiffs the lower appellate Court affirmed the decision of the Court of first instance.

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On second appeal by the plaintiffs to the High Court they contended that the defendant Bhawani Prasad, who had purchased the rights and interests of Kalandar Lal only, could not obtain their shares, as they were not parties to the suit against Kalandar Lal, and the defendant Bhawani Prasad, if he considered them liable for the debt due to him, should have sued and obtained a decree against them. The appeal came for hearing before Pearson, J., and Straight, J., who differed in opinion on the point whether

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under the circumstances the plaintiffs were entitled to recover their shares of the joint family property. The following judgments were delivered by the learned Judges:—

PEARSON, J.—In execution of a decree passed in favour of the defendant Bhawani Prasad on the basis of a bond executed by the defendant Kalandar Lal, in which the landed estate and the houses to which the present suit relates were hypothecated to secure the repayment of a loan, that property was sold and purchased by the decree-holder. The present suit has been instituted by the sons and grandsons of the judgment-debtor for the purpose of avoiding the sales in respect of their legal shares in that property. The claim rests on the averment that Kalandar Lal had borrowed the money in consideration of which the bond was executed without lawful cause, and that the plaintiffs' shares in the hypothecated property could not therefore be held liable for the debt. The lower Courts have found that the averment is untrue, and that the money was borrowed by Kalandar Lal as the head and manager of the family for the family expenses with the knowledge and consent of the plaintiffs who have shared in the benefits derived from the use of the money: and have dismissed the suit.

The ground on which the decision of the lower Courts is impugned by the appeal before us is that the auction-purchaser, who purchased the rights and interests of Kalandar Lal only at the auction-sales, cannot have acquired by his purchase the shares of the appellants who were not parties to the suit in which the decree ordering the sales was passed.

The ground of appeal is undoubtedly specious. It cannot be denied that the plaintiffs-appellants were not parties to the suit in which the decree was passed, that it was passed against Kalandar Lal alone, and that his rights and interests in the property only were ostensibly sold. It must also be allowed that the Privy Council's decision in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) countenances and supports the appellants' contention. Moreover the general principle that no person not a party to a suit can be affected by the decree passed therein is indisputable. But that principle may not be applicable in cases in which the

(1) I. L. R., 3 Calc., 198.

party sued was sued in respect of some matter in which he had acted as the agent and representative of others as well as on his own behalf. There is nothing unreasonable in holding that the head of the family may be taken to represent its members. In a joint Hindu family the control and management of the family property belongs to the father, who is therefore a person with whom outsiders are justified in dealing as the representative of the family and who may justly be sued as such. It may not then have been necessary in the suit brought by Bhawani Prasad against Kalandar Lal that the plaintiffs should have been joined as co-defendants with the head of the family. It might have been well had Bhawani Prasad in that suit distinctly stated that he had dealt with Kalandar Lal in the matter of the bond as the head of the family, and not in his individual capacity, and that the property hypothecated in the bond was property in which the members of his family were interested. But the omission to state those particulars does not compel us to hold, in the face of the decision in the present suit, that Kalandar Lal was in that suit sued personally and not as the head of his family.

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In the case of *Bissessur Lall Sahoo v. Luchmessur Singh* (1) it was held that two decrees passed against one of two heirs of Ram Nath Das affected the other heir, "being substantially decrees in respect of a joint debt of the family," and could be "properly executed against the joint family property." The authority of this decision which is of later date than the decision in the case of *Deendyal Lal v. Jugdeep Narain Singh* (2) above-mentioned permits us to decide the case before us in accordance with justice. Accordingly I would dismiss the appeal with costs.

STRAIGHT, J.—I regret I am unable to concur in the judgment of my honourable colleague Mr. Justice Pearson, the more so as I find that the view I entertain upon the question raised by this appeal is directly in conflict with a ruling of Spankie and Oldfield, JJ., in *Deva Singh v. Ram Manohar* (3). I should have hesitated to differ in the present case, did it not appear to me that that decision was passed under a misinterpretation of a Privy Council judgment,

(1) 5 Calc. L. R., 477 ; L. R., 6 Ind.
 App., 233.

(2) I. L. R., 3 Calc., 198.

(3) I. L. R., 2 All., 746.

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which I will fully advert to presently, and is directly at variance with another precedent of the same tribunal.

I presume it may be taken as admitted for the purpose of discussing the point raised in the present appeal that the suit of the respondent, Bhawani Prasad, was instituted and the decree in it given against Kalandar Lal alone, and that what was sold upon it in execution was Kalandar Lal's right, title, and interest as judgment-debtor. Under such circumstances, if the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) is still to be acted upon as sound law, it would seem to be a distinct and positive authority to the effect that all Bhawani Prasad, as auction-purchaser, could acquire was the right possessed by Kalandar Lal to compel partition, or in other words, all he could take under the compulsory sale was such share as the judgment-debtor might have got under a partition. "If he had sought to go further," their Lordships in that case say, "and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than was seized and sold in execution, viz., the right, title, and interest of the father." I cannot imagine language more explicit to recognize the long-established and well-understood principle of law that no interests but those of persons who are actually parties to a decree can be affected in execution. It is now said, however, that the views thus expressed by their Lordships of the Privy Council have been modified, if not overruled, in *Bissessur Lall Sahoo v. Luchmessur Singh* (2), and my honourable colleagues seem to have adopted this suggestion. But with great respect to them, it seems to me that they have done so under a misinterpretation of the judgment in the latter case, and in construing it to establish, as a rule for general guidance, what was only intended to be applicable to that particular suit and its special and peculiar circumstances. I think also that some confusion is caused by mixing up the circumstances of the litigation between the sons and the auction-purchaser with the earlier proceedings by the auction-purchaser against the father for the recovery of

(1) I. L. R., 3 Cal., 198. (2) 5 Cal. L. R., 477; L. R., 6 Ind. App., 283.

the original debt. Now it must be observed that in the judgment in *Bissessur Lal Sahoo v. Luchmessur Singh* (1) as also in the argument of counsel on both sides, no mention of the case of *Deendyal Lal v. Jugdeep Narain Singh* (2) is to be found, though it had been decided only some two years before, and was on authority that had already been followed by the Indian Courts in several instances. If their Lordships intended to disturb or qualify it, as a precedent, it is difficult to understand their thus passing it by without reference or observation of any kind. In deference to the views of my colleagues, I feel bound to examine somewhat in detail the fact of *Bissessur Lal Sahoo v. Luchmessur Singh* (1) for the purpose of ascertaining, if I can, the real grounds upon which the decision of that appeal proceeded. One Nath Das, father of Ram Nath Das, died in 1853 leaving his son and a widow him surviving. Ram Nath Das died in 1855, and he left a widow and two sons Musahib and Chuman. In 1862 three suits were instituted on behalf of the infant Raja of Ramnagar for arrears of rent alleged to be due from Nath Das and Ram Nath Das' family, and they were directed as follows. The first against the widows of Nath Das and Ram Nath Das as guardians of Musahib and Chuman; the second against Musahib as heir of Nath Das; the third against the widow of Ram Nath Das as guardian of Musahib. It would therefore seem that in each suit the defendants were brought on to the record, not only for themselves and any interest they individually might have, but in a representative capacity. It must be conceded that neither in the second nor in the third case was Chuman specially mentioned, but from the mode in which his brother was cited in the one and his mother in the other suit, they might fairly be said to be his representatives, and any defence they could put forward to the claim must have had the effect of protecting his interests as well as their own. Then as to the decrees, they were passed in case No. 1 against the property left by Nath Das and Ram Nath Das; in No 2 against the property left by Nath Das only; in No. 3 against the property left by Ram Nath Das. In execution no objection was ever made, either by the widow or by Musahib or Chuman, and it was under

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(1) 5 Calo. L. R., 477; L. R., 6 Ind. (2) I. L. R., 3 Calo., 198.
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1881 the special circumstances of a suit so brought and relief thus decreed
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I therefore entirely fail to see in what way their Lordships' decision in *Bissessur Lall Sahoo v. Luchmessur Singh* (2) can be held to disturb the authority of *Deendyal Lal's* case (1), the principle

(1) I. L. R., 3 Calc., 198. (2) 5 Calc. L. R., 477; L. R., 6 Ind. App., 233.

of which appears to me to be directly applicable to the present appeal. Bhawani Prasad might have so framed his suit against Kalandar Lal as to make it one for the recovery of a debt incurred by him in the character of head and manager of a joint Hindu family, and by joining the sons and grandsons, of whose existence he was perfectly well aware, all difficulty might have been obviated. As he did not do so, he cannot in my opinion take under the auction-purchase at the sale in execution more than the share of the person against whom he obtained his decree. The argument that hardship is thus entailed upon him I cannot entertain, and it seems to me much greater injustice and inconvenience would be caused by allowing the rights and interests of persons to be disposed of by sale in execution of decrees in suits to which neither in person nor by a representative were they cited as parties, than by leaving auction-purchasers in their natural position of taking what is in terms sold to them and no more. I am fortified in this view by a valuable and exhaustive judgment of Innes, J., in *Venkataramáyyan v. Venkatasubramánia Dikshatar* (1), with which I may say I entirely concur not only in the conclusions but in his criticisms on the several cases to which he refers, all of which I have been at pains to examine and consider. I would therefore reverse the decision of the lower Courts and decree the appeal, but, having regard to all the circumstances, without costs.

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The plaintiffs appealed to the Full Court from the judgment of Pearson, J., under cl. 10 of the Letters Patent, raising the same contention as they had raised before the Division Bench.

The *Senior Government Pleader* (Lala Juala Prasad) for the appellants.

Munshi *Kashi Prasad* for the respondent.

The following judgments were delivered by the Full Court :

PEARSON, SPANKIE, and OLDFIELD, JJ., concurring—The suit has been brought to recover 1 anna $7\frac{1}{2}$ pies out of a 2-anna share in a village and four shares of two buildings, by setting aside two auction-sales dated 20th and 15th March 1879, respectively, held in execution of a decree, dated 21st June 1878, obtained by Bhawani

(1) I. L. R., 1 Mad., 358.

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Prasad against Kalandar Lal in a suit which the former brought on a bond dated 15th June 1875, executed in his favour by Kalandar Lal by which the two annas share was mortgaged. Bhawani Prasad purchased the property sold at the auction-sales. Plaintiffs are the four sons of Kalandar Lal, and sue to recover their shares on the ground that Kalandar Lal contracted the debt without legal necessity. The defence was that the money had been borrowed for family necessities and with consent of plaintiffs. Both Courts dismissed the suit. In second appeal to this Court a plea was taken by plaintiffs that Bhawani Prasad bought only the rights and interests of Kalandar Lal, and not the shares of plaintiffs, who were not parties to the suit, which was brought against their father only. The appeal was heard by a Division Bench consisting of Pearson, J., and Straight, J., and the decrees of the lower Courts were affirmed, Mr. Justice Straight dissenting. An appeal has now been preferred to the Court at large from the judgment of Mr. Justice Pearson on the same ground taken before the Division Bench.

The question to be determined is whether the rights and interests of Kalandar Lal only in the property passed to Bhawani Prasad at the two sales, or whether the whole family property was sold, including the sons' interests, and in order to arrive at a determination we must examine the proceedings in the suit brought by Bhawani Prasad against Kalandar Lal, and the decree made in it, and the execution-proceedings, in order to ascertain if the decree was made for the recovery of a family debt against Kalandar Lal as representative of a joint Hindu family. In the case of *Bissessur Lall Sahoo v. Luchmessur Singh* (1) two decrees had been obtained against a member of a joint Hindu family as heir of his grandfather to recover a family debt, and it was held that the entire family property was properly saleable under those decrees. Their Lordships observed: "It appears to their Lordships that acting on the principle which follows from their finding that this family is joint, it must be assumed that Musahib Das is sued as a representative of the family." That decision therefore is an authority for holding that, when a suit is brought to recover a family debt against a member

(1) 5 Calc. L. R., 477; L. R., 6 Ind. App., 233.

of a joint Hindu family, it may be assumed that the defendant is sued as representative of the family; and also for holding that, when looking at the substance of the cases and the decrees the latter are substantially decrees in respect of a joint debt of the family and against the representatives of the family, they may be properly executed against the family property. To consider the father as representing the family in a suit brought against him for recovery of a family debt is quite consistent with the status of a joint Hindu family, in which the father in regard to his minor sons is the natural guardian in all cases, until partition takes place the legal head and representative of the family in all dealings respecting the family property.

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In the case before us it is admitted that of the four sons of Kalander Lal three were minors under the father's guardianship when the bond dated the 15th June 1875 was executed, and it was witnessed by the fourth adult son. It is now disputed that Kalandar Lal was acting for the family and borrowed the money for family necessities, a fact which sufficiently appears from the recitals in the bond, and the suit was brought against Kalandar Lal for the recovery of this family debt from the hypothecated and other property, and the decree was made for the sum due by enforcement of the hypothecation, and the decree-holder in taking out execution applied to bring to sale the entire two annas share hypothecated and the two buildings, all being joint family property. Looking to the above facts it seems reasonable to hold that Kalandar Lal represented his sons in the suit brought for recovery of the family debt, and that the intention of the decree was to recover the debt from the hypothecated family property, the whole of which it was intended to sell at the auction-sale, and the auction-purchaser is entitled to the same. It appears that the two houses sold in execution of the decree dated 21st June 1878 were not hypothecated in the bond dated 15th June 1875, and that the decree above-mentioned, while it awarded to the plaintiff in the suit which it terminated the total amount claimed by him with future interest, only provided for its realization by the enforcement of the lien. Had the plaintiffs in the suit which is brought before us by the present appeal claimed avoidance of the sales of the

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houses in so far as their own rights and interests were affected thereby, on the ground that those sales could not legally be made in execution of the decree, it would have been incumbent on us to determine the question raised by such a contention as to the right construction of the terms of the decree. But as no such contention has been made by or on behalf of the plaintiffs at any stage of the proceedings, either in the lower Courts or in this Court, we do not feel called upon to decide it.

The decision of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh* (1) has been pressed upon us as an authority for holding that, as the sons were not formally made defendants in the suit brought against their father Kalandar Lal, the decree obtained in that suit can only be considered to be a personal decree against Kalandar Lal, and that neither the decree nor the auction-sales made under it will affect them. That case, however, does not necessarily conflict with the principle laid down in *Bissessur Lall Sahoo v. Luchmessur Singh* (2) or with the view now taken in the case before us. The facts of the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) are distinguishable. There the decree-holder, Deendyal Lal, had obtained a bond from Toofani Singh, the father of the plaintiff, in which certain property was hypothecated, but he contented himself with suing Toofani Singh, and obtaining a money decree only against him, and instead of taking steps to enforce the hypothecation he took out execution against the right, title, and share of Toofani Singh only in some joint family property belonging to him and his son the plaintiff, property which had not been claimed by him in his suit nor decreed, and he himself became the purchaser. As observed by Mr. Justice Phear in his judgment in that case," the property was not sold in pursuance of a decree directing that it should be sold, or in any manner pointing out that it was the property out of which the debt should be realized.....The judgment-debtor chose for reasons of his own simply to sell the right, title, and interest of the father; and he cannot now, I think, be heard to assert that he is entitled to hold the whole property, as if he had in fact sold the whole family property, and was, at the time of the execution-sale, entitled to do so (3)." It is in these points

(1) I. L. R., 3 Cal., 198.

(2) 5 Cal. L. R., 477; L. R., 6 Ind.

(3) 12 B. L. R., at pp. 102, 103.

App., 233.

that the case we are dealing with and that of *Bissessur Lall Sahoo v. Luchmessur Singh* (1) are to be distinguished from that of *Deendyal Lal v. Jugdeep Narain Singh* (2): and in the case cited by Mr. Justice Straight in his judgment—*Venkatarádayyan v. Venkatasubramánia Dikshatar* (3)—it will be seen that the judgment of the Chief Justice and Mr. Justice Kindersley proceeded on the ground that nothing in the litigation indicated that it was intended to enforce the debt due from the whole family, and that the decree was not passed against the father as managing member of the family, and therefore the question whether his minor sons though not parties to the record may be considered as represented by their father did not arise. In each case we have to ascertain what the intention and operation of the decree and execution-proceedings substantially are, and to give effect to them. The appeal should be dismissed with costs.

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STUART, C.J.—I substantially concur in the judgment of my colleagues Pearson, Spankie, and Oldfield, JJ., and in their examination of the authorities which were referred to at the argument. The case of *Deendyal Lal v. Jugdeep Narain Singh* (2) is clearly distinguishable, and in my opinion has no application to the case before us, as to which it seems to me that the reasons assigned by the Judge for the conclusion he arrived at are sufficient. It cannot I think be for one moment doubted that the defendant Kalandar Lal incurred the debt in question for a necessary and not for an immoral or extravagant purpose, and that he executed the bond in suit in a representative capacity in behalf of the family, and the bad faith of the plaintiffs is but too apparent, they having been not only consenting parties to the mortgage, but having taken benefit under it. Under these circumstances, the doctrine of the Hindu law on the subject laid down by Mr. Justice West in his admirable digest of the Hindu Law, 2nd edition, 1878, page 340, strictly applies, where it is stated that “the Hindu law lays down broadly that sons and grandsons shall discharge the obligation of their ancestors, except where they have been contracted for immoral purposes, and this duty is not altered by a partition amongst the sons.” I am

(1) 5 Calc. L. R., 477; L. R., 6 Ind.

App, 233.

(2) I. L. R., 3 Calc., 198.

(3) I. L. R., 1 Mad., 358.

1881 therefore of opinion that the order of the Division Bench must be affirmed.

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STRAIGHT, J.—I see no reason to alter the opinion I expressed upon this case when it was before the Division Bench of which I was a member, and I regret that I am constrained to hold a view at variance with the rest of the Court. The impropriety in conduct or bad faith of the plaintiffs-appellants has as far as I can see no bearing one way or the other upon the plain legal question raised by this appeal, namely,—Can the rights and interests of the other members of a joint Hindu family be affected by sale in execution of a decree against the father alone for enforcement of lien under a bond executed by him charging the whole joint property, when such decree has been passed in a suit in which the father was sole defendant and to which none of the other members of the joint family either personally or by formally constituted representatives were made parties. As I expressed my views upon the matter at length in my former judgment it is unnecessary to recapitulate them now, or to do more than say that I adhere to them and to the order which I was then of opinion should be passed on the appeal.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

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January 28.

BINDESHRI CHAUBEY AND OTHERS (PLAINTIFFS) v. NANDU
(DEFENDANT).*

Return by Appellate Court of plaint for amendment or presentation to proper Court—Appeal from Order—Second Appeal to High Court—Act X of 1877 (Civil Procedure Code), ss. 540, 588 (6).

The lower Appellate Court (Subordinate Judge) decided on appeal by the defendant from the decree of the Court of instance (Munsif) that the Court of first instance had no jurisdiction to entertain the suit, as the value of the subject-matter of the suit exceeded the pecuniary limits of its jurisdiction; and ordered that “the appellant’s appeal be decreed, the decision of the Munsif be reversed, and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court.” The plaintiff appealed to the High Court from such order as an order returning

* Second Appeal, No. 61 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 21st July 1880, reversing a decree of Maulvi Abdul Razzak, Munsif of Deoria, dated the 19th March 1880.

a plaint to be presented to the proper Court. *Held* that such order could not be regarded as one to which art. (6) of s. 588 of Act X of 1877 was applicable. That relates to orders returning plaints for amendment or to be presented to the proper Court passed by a Court of first instance, and not to an order by an Appellate Court upon an appeal to it from the decree of a Court of first instance on general grounds. The plaintiff's proper course was to have preferred a second appeal.

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THE defendant in this suit, which was instituted in a Munsif's Court, set up as a defence to it that the value of its subject-matter exceeded one thousand rupees, and consequently the jurisdiction of the Munsif did not extend to the suit. The Munsif decided that the value of the subject-matter of the suit did not exceed one thousand rupees and the suit was therefore cognizable by him; and proceeded to decide the suit on the merits and gave the plaintiffs a decree. On appeal by the defendant the lower Appellate Court decided that the value of the subject-matter of the suit exceeded one thousand rupees and the suit was not cognizable by the Munsif, and directed "that the appellant's appeal be decreed, the decision of the Munsif be reserved, and the record of the case be sent to the Munsif to return the plaint to the plaintiffs for presentation in the proper Court."

The plaintiffs thereupon preferred an appeal to the High Court impugning the decision of the lower Appellate Court as to the value of the subject-matter of the suit, appealing as from an order.

Mr. Conlan for the appellants.

Babu Baroda Prasad for the respondent.

The High Court (SPANKIE, J., and STRAIGHT, J.) delivered the following judgment:—

STRAIGHT, J.—Following our decision in First Appeal from Order No. 130 of 1880 (1), we do not think that the decision of the Subordinate Judge upon the appeal before him,—“that the appellant's appeal be decreed, the decision of the Munsif reversed, and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court”—can be regarded as an order to which art. (6) of s. 588 of Act X of 1877, as amended by Act XII of 1879, is applicable. It appears to us that this

(1) Unreported.

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relates to orders "returning plaints for amendment or to be presented to the proper Court" passed by the Court of first instance, and not to a decision of an Appellate Court upon an appeal to it against the judgment of a first Court on general grounds. The proper course for the appellants to have pursued was to file a special appeal, and accordingly this second appeal as from an order must be dismissed with costs. But we direct that the memorandum of appeal be returned to the appellants for filing, as a special appeal, upon payment of the requisite court-fees.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Spinkie.

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January 28.

SIRDAR SAINNEY (PLAINTIFF) v. PIRAN SINGH (DEFENDANT).*

Absent co-sharer—Najib-ul-arz—Trust.

S and his brother owned an eight annas share of a village, and *H* and *D* owned the other eight annas share, the parties being related to each other by blood. In 1865 (Sambat 1921), at the settlement of the village, the following statement was recorded by the Settlement Officer in the *wajib-ul-arz* at the instance of *H* and *D*, with whom the settlement was made, *S* and his brother being absent from the village and having been absent for some ten years:—"We, *H* and *D*, are equal sharers of one eight annas and *S* and (his brother) of the other eight annas in the village according to descent: ten years ago *S* and (his brother) went away into Orai; their present residence is not known: they have not left woman, child, or heir of any kind in the village: on that account the entire sixteen annas of the village are in possession of us, *H* and *D*: at the time of the preparation of the *khewat* we made a gift of four annas of our own eight annas to *P* and have given him possession of four annas of the eight annas belonging to *S* and (his brother), keeping the remaining four annas in our own possession: when *S* and (his brother) return to the village we three who are in possession shall give up the eight annas share of the aforesaid persons." In March 1880 *S* sued *P* for possession of the four annas mentioned in the *wajib-ul-arz* as having been made over to him by *H* and *D* out of the eight annas share belonging to *S* and his brother. He based his suit upon the *wajib-ul-arz*, but did not expressly state that the share in suit had been intrusted to *H* and *D* on the understanding that it should be returned to him when he reclaimed it. The lower appellate Court dismissed the suit as barred by limitation on the ground that *P*'s possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when *S*, having returned to the village, had claimed the share and *P* had refused to surrender it. On second appeal it was contended by *S*

* Second Appeal, No. 827 of 1880, from a decree of J. Liston, Esq., Deputy Commissioner of Lalitpur, dated the 17th June 1880, reversing a decree of W. J. Greenwood, Esq., Extra Assistant Commissioner of Lalitpur, dated the 13th April 1880.

that under the terms of the *wajib-ul-ars* *P*'s possession was that of a trustee and his possession could not be held to be adverse.

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Per SPANKIE, J.—That, inasmuch as there was no direct evidence that the share in suit had been intrusted by *S* to *H* and *D* on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the *wajib-ul-ars*, which amounted to nothing more than an acknowledgment of *S*'s title and an offer to surrender possession when he returned, and as when he did return in 1866 or 1867 *P* refused to surrender possession, *S* was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation.

Per PEARSON, J.—That although no mention was made in the *wajib-ul-ars* of such a trust as was contended for, yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the *wajib-ul-ars* and to the fact that *S* and his brother were not strangers to *H* and *D*, nor merely co-sharers, but near blood relations, probably residing together on the same premises and partners in agricultural labours, further inquiry should be made with the view of elucidating the nature of the acquisition of *H* and *D* of the share and of their subsequent possession.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Lala Lalta Prasad for the appellant.

Babu Jogindro Nath Chaudhri for the respondent.

The High Court (PEARSON, J., and SPANKIE, J.) delivered the following judgments:—

SPANKIE, J.—The suit (1) was for a 4-anna share in mauza Bedora under the provisions of paragraph 12 of the village administration-paper. The plaint avers that Sirdar Sainey (plaintiff) and Sabsukh Sainey (deceased) were brothers and were both absent from the village at the last settlement serving as customs chap-rasis in Orai: they never heard of the settlement operations and could not be present to secure possession of their 8-anna share: Hirdey and Dariao Singh were the owners of the remaining eight annas and were found in possession of the eight annas belonging to plaintiff and Sabsukh: these two persons sold a 4-anna share to Piram Singh defendant: plaintiff and Sabsukh were recorded in the *khewat*, or record-of-rights, as “absentees” out of possession: in Sambat 1926 (March 1869—April 1870) plaintiff and his brother

(1) Instituted on the 5th March 1880.

1881 <hr style="width: 100px; margin: 0;"/> SIRDAR SAINRY v. PIRAN SINGH.	<p>returned to Bedora and got back four annas out of their eight annas, but Piran Singh, defendant, would not give up the 4-anna share now in suit: Sabsukh died in Sambat 1928 or 1871 A.D. : the plaintiff procured record of his name, but defendant Piran Singh would not give up possession of the 4-anna share: the plaintiff sold his own 4-anna share (reserving a small plot of land as <i>haq-i-malikana</i>) to Mannu Lal and Piarey Lal: he now brings this suit under paragraph 12 of the administration-paper. I quote the terms of the administration-paper relative to the shares of absent proprietors:—"Paragraph 12—Of owners out of possession.—We Hirdey and Dariao Singh are equal sharers of one eight annas and Sabsukh and Sirdar Sainey the owners of the other eight annas share in the village according to descent: ten years ago Sabsukh and Sirdar went away into Orai: their present residence is not known: they have not left any woman, child, or heir of any kind in the village: on that account the entire sixteen annas of the village are in possession of us Hirdey and Dariao: at the time of preparation of the <i>khewat</i> we made a gift of four annas out of eight annas of our own to Piran Singh, and have given possession of four annas out of eight annas, the property of Sabsukh and Sirdar in our possession, to the said Piran Singh, keeping the remaining four annas in our possession: when Sabsukh and Sirdar return to the village and claim their property, we three who are in possession shall give up the eight annas share of the aforesaid persons." The defendant Piran Singh replied that plaintiff had been absent 32 years from the village: the settlement was made with Hirdey and Dariao Singh: when the <i>khewat</i> was written they recorded Sabsukh and Sirdar as proprietors of four annas each out of possession: the administration-paper provided for the return of the shares to them on their return: in the meantime Hirdey and Dariao Singh constituted defendant a sharer of eight annas: they sold four annas out of their own share and four annas out of the eight annas of Sabsukh and Sirdar: defendant then spent Rs. 500 on restoring the village: in Sambat 1923 (March 1866—April 1867) plaintiff and Sabsukh returned to Bedora, and defendant offered to give up the four annas in suit to them, but they refused to take the share and again left the village: again in Sambat 1929 (April 1872—March 1873)</p>
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they returned and disposed of the share by sale to Mannu Lal and Piarey Lal, retaining a plot of land as *hag-i-malikana*: as plaintiff has parted with the share the donees alone can sue for possession.

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The first Court found that the alleged gift by plaintiff of the four annas to Mannu Lal and others did not affect the case: plaintiff was recorded as owner of the share and by the terms of the administration-paper defendant was bound to restore it. The Assistant Commissioner therefore made a decree in plaintiff's favour. Upon this the defendant appealed to the Deputy Commissioner, who thought it necessary to make some further inquiry. But he observed that on the 4th September 1872 Hirdey and Dulari, son of Dariao Singh, and Sirdar (the plaintiff) gave by a deed of gift twelve annas to Mannu Lal and others, but when giving possession it appeared that Piran Singh was in possession of Sirdar's four annas share. I take this to mean that no effect was given to the gift, and I would add here that I agree with the Munsif that, as between the plaintiff and defendant in this suit, this alleged gift to other persons who are not before the Court is no part of the case. The Deputy Commissioner did not believe that Piran Singh had spent Rs. 500 in improving the village, and if he did spend Rs. 500 he did so for his own benefit, well knowing that by the terms of the record-of-rights he would have to restore the 4-anna share of Sabsukh and Sirdar on their return, and that there was no stipulation in the record-of-rights as to expenditure. But the first Court had not considered the question of limitation raised by Piran Singh, and therefore it remained to inquire on what date Sirdar returned to the village, for from that date will the time allowed by law run. In order to ascertain this point the Deputy Commissioner himself examined Sirdar and Piran Singh and others, and amongst them the patwari; and upon the statement of Sirdar himself and from the patwari's evidence and settlement papers he found that the suit was barred by limitation, inasmuch as Sirdar admitted that he returned two years before the famine of 1868-1869, *i. e.*, in 1866 or 1867. The Deputy Commissioner therefore decreed the appeal.

It is contended in special appeal that the possession of defendant under the terms of the administration-paper was not adverse but

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that of a trustee on behalf of appellant: therefore the suit was not barred by lapse of time. If by the appeal it is intended to rely upon the administration-paper as declaring or constituting a trust, I do not think that it does anything of the kind. I have already cited its terms. The shareholders in possession are called upon by the Settlement Officer to state what they know about the share. They make their statement for the information of the Settlement Officer, who is bound to record the shares, and paragraph 12 of the administration-paper records the statement made by the shareholders on the point; and paragraph 12 of the administration-paper in this suit records that the plaintiff and Sabsukh owned eight annas: that they are out of possession for ten years: that Hirdey and Dariao Singh are in possession of the entire sixteen annas in consequence of their absence; that Piran Singh has got possession of eight annas under an agreement with them, but that all three would restore the shares after Sabsukh and Sirdar returned and claimed them. They do not profess to be holding the shares under any trust from Sabsukh and Sirdar, nor to be under any agreement with them to restore the share when they returned. They simply do not deny but admit the ownership of Sabsukh and Sirdar Singh, and they account for their own possession of all the lands by the fact that ten years previously these persons had abandoned the village "leaving no woman, child, or heir behind them." The plaintiff himself in this case does not come into Court upon a claim founded on a trust declared by himself and his brother Sabsukh when they left the village. There is no evidence called to support any trust. The twelfth paragraph of the administration-paper does as already found profess that the parties in possession are holding for the benefit of Sabsukh and Sirdar. In one sense the parties in possession may be said not to expect their return, for they left ten years before, and from the patwari's evidence the *khewat* and the administration-paper were prepared in 1865. They are dated on the 26th January 1865, though they were not attested until July 1868, so that when the statement was made concerning their shares these men had already been absent from the village for ten years, during which time Hirdey and Dariao Singh had been in possession and enjoying the profits. Because Hirdey and Dariao Singh acknowledged that by descent Sabsukh and Sirdar were owners

of eight annas, because they were willing to give up the shares on the return of the absentees, their willingness to do this cannot be carried further than the statement goes. The record in the administration-paper is not a trust by implication. It is not as if it was the writing of a trustee stating the trust or written in language clearly expressing a trust. The record is nothing more than a simple statement of facts made at the bidding of a Settlement Officer. It was ruled by this Court in a very similar case—*Doorjun v. Chaina* (1)—as follows: “As to the existence of a trust, none is suggested. The plaintiffs’ ancestors quitted the village many years ago. The defendants, co-sharers, entered into possession of their lands, and have since held them. The records still continued, however, to make mention of the names of the absentees; * * * The mere entry in the Collector’s records of the names of the absentees could not of itself avail to alter the character of the holding. It is admitted by the respondents’ pleader that no other evidence appears on which the supposition can be supported that there was any trust or confidence between the absentees and the respondents.” Here the plaintiff does not allege a trust, and the only apparent difference between this case and the one cited is that the parties in possession say that if Sabsukh and Sirdar return they would give up the lands. This I cannot think is an admission that they held the share as trustees for the absent owners, having undertaken to do so when Sabsukh and Sirdar left the village, or that they constituted themselves as trustees for them in 1865. In another case—*Nahana v. Dya Ram* (2)—where the plaintiffs sued to recover a share in a village on the allegation that it had been taken by the other shareholders of the village in trust for their father, according to custom, on his absconding from the village by reason of his inability to pay his quota of Government revenue, it was held that the only evidence of custom was a provision in the administration-paper that the share of a person should be held in trust for him for twelve years only. It was held that, as the father of the plaintiffs did not reclaim his share within twelve years, the plaintiffs’ right was forfeited. The trust was described in the settlement record as a “*sipur dagi*.” The Court remarked that “there is no evidence except the administration-paper of 1851 from which we can gather what the terms of the custom were under which the

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(1) N.-W. P. H. C. Rep., 1870, p. 43. (2) N.-W. P. H. C. Rep., 1873, p. 170.

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trust is alleged to have been constituted." The Court, however, accepted it as a record of a pre-existing custom. Now this would seem to show that the custom of that particular village-community was that, if parties who were absent at settlement did not return within a certain time after they had gone away leaving their lands with the shareholders who were present, they would lose their right altogether. The custom does not support the theory that, because *A* is holding lands in consequence of *B*, the owner, having abandoned the village, leaving no wife, child, or heir, that *A* thereby constitutes himself, in the absence of any agreement between the parties, as a trustee for *B* for ever. On the contrary, the particular reference to twelve years goes to show that the community did not recognise the right of any sharer to leave his lands, without any special trust, in the hands of the sharers, and to claim them after the general limitation law of the country had barred their claim to re-enter.

But now I turn to another case—*Piarey Lal v. Saliga* (1)—which is very pertinent to the present case. In this suit a clause of the administration-paper stated in general terms that absconders from the village should receive back their property on their return, and certain persons, who absconded from the village before the administration-paper was recorded, sued to enforce the clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to the administration-paper, alleging that their property had vested in such co-sharer for them. But it was held that, before such co-sharer could be taken to have held their property as a trustee, there must be evidence that he accepted such trust, and this fact could not be taken to be proved by the administration-paper. Again it was held lately—*Harbhaj v. Gumani* (2)—that a village administration-paper, which provides for the surrender to the absent shareholders on their return to the village of the lands formerly held by them, does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust. It was also ruled, where a village administration-paper provided for the surrender to certain absent shareholders on their return to the village

(1) I. L. R., 2 All., 394.

(2) I. L. R., 2 All., 493.

of the lands previously held by them, but did not contain any declaration of a trust as existing between such shareholders and the occupiers of their lands, at the time such administration-paper was framed, that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. The clause in that suit was very similar to that on which the present suit is brought. It recited the names of the persons absent from the village, and declared that when they returned they should be placed in possession of their shares, and that the persons occupying should not object to relinquish their occupation: there was to be no account of profit and loss. It was observed that "the arrangement as to the re-entry of an absentee was made amongst the co-sharers present in the village: possibly the main object in making it was to secure possession to those in occupation of the shares of absentees. * * *

If an administration-paper containing a clause such as that before us is to be regarded as constituting a trust, it would appear to be a trust created by the shareholders of the estate, ostensibly for the benefit of absentees, though the latter really derive no present benefit from their land remaining in the possession of the shareholders in the estate, whereas the shareholders are at once benefited by taking up the shares of the absentees, which they may possibly be never called upon to surrender without, as in this case, the institution of a suit. Moreover the arrangement may be one which the shareholders actually present when it is made may afterwards, if they please, revoke or omit to record in a future settlement."

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I have found one case—*Durga Parsad v. Asa Ram* (1)—in which the Court held, looking at all the circumstances of the case, that the parties who took possession of a house which belonged to two persons transported for life had done so subject to a constructive trust in favour of the transported persons. The first Court found that there was an express trust. The second Court held that there was no proof of any such express trust. Oldfield, J., remarked that there were circumstances which the lower appellate Court had overlooked which amounted to fraudulent conduct on the

(1) I. L. R., 2 All., 361.

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part of those who took possession of the house, such as would by equitable construction convert their holding into that of trustees. Straight, J., found from all the circumstances and the relationship between all the parties that a constructive trust existed in the two persons who had possession on behalf of the transported owners from the day their imprisonment commenced. He also held that the conduct of the parties had been of a fraudulent character. There is nothing in the judgment that conflicts with the previous decisions. In the case before me there is no evidence whatever of a trust declared by the plaintiff, nor is there evidence which the Court might construe in favour of an intention to create a trust, and this precedent, which, however, was not cited by appellant, does not benefit his case.

It is a rule of law that all declarations or creations of trusts or confidences of any kind should be manifested and proved by some writing signed by the party who is by law entitled to declare such trust. The administration-paper, even if signed by the alleged trustees or admitted by them, is not signed by the absentees who declare the trust; and, as already observed, the record does not state any trust, nor is its language clearly expressive of a trust intended by Sabsukh and Sirdar, and therefore it is neither a declared trust, nor evidence of a trust by implication; and as neither the plaintiff himself has based his suit upon an alleged trust, nor brought any evidence to support such trust, any record such as that in paragraph 12 of the administration-paper, on which he does base his claim, cannot be regarded as conclusive evidence of the existence of a trust, and not even, in my opinion, looking at the terms, as any evidence at all of a trust. The plaintiff himself in the plaint says that he demanded the land back on his return in 1926 Sambat (1869-1870), and defendant would not restore it. The defendant said that he offered to give it back in Sambat 1923 (1866-1867) on the plaintiff's return, but the latter would not take it. As we have seen, the plaintiff was examined by the second Court, and he then stated that he had returned two or three years before the famine, which was admittedly in 1868 or 1867. It is quite clear that he was not back in 1865 when the *khewat* and *wayib-ul-arz* were prepared, since they contain the record of his

absence and were framed in January, 1865, i.e., in Sambat 1921. The patwari says he came back in 1923 or 1924, and there is evidence in support of his return at that time. Sirdar, the plaintiff, says distinctly: "I asked for my share when I returned and he (defendant) would not give it up." If this be so, there being no evidence of any trust, and nothing more than an acknowledgment in the administration-paper of title in the plaintiff and an offer to surrender possession when the plaintiff returned, I hold that, when he did return and claim the property and the defendant refused to give up possession, the plaintiff was bound to bring a suit to recover the share within twelve years, and, as he has failed to do so, it seems to me that the lower appellate Court very properly dismissed his suit as barred by limitation, and I would therefore dismiss the appeal with costs.

PEARSON, J.—The defendant pleaded in answer to this suit, *inter alia*, that in Sambat 1929 (April 1872—March 1873) the plaintiff and his late brother Sabsukh had conveyed their eight annas share to Mannu Lal, Piarey Lal, and others. The plea raised a question as to the plaintiff's competency to bring the suit. The lower Courts have failed to appreciate the importance of the plea and to dispose of it; and the omission appears to me to be a material defect in their decisions. The lower appellate Court has dismissed the suit as barred by the law of limitation apparently on the ground that the defendant's possession of the share in suit became adverse in 1866 or 1867 more than twelve years before the date of the institution of the suit. The ruling is impugned by the appellant who contends that under the terms of the *wajib-ul-ars* the defendant's possession was that of a trustee, and that his possession cannot be held to be adverse. How he became possessed of the share in suit has not been stated by either of the parties or ascertained by the lower Courts. The claim is laid on the twelfth paragraph of the *wajib-ul-ars* which does not make express mention of the share having been intrusted to Hirdey and Dariao on an understanding that it should be returned to the plaintiff when reclaimed by him, but nevertheless under the circumstances strongly suggests that such may have been the case. In the paragraph aforesaid Hirdey and Dariao are

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careful to put it on record that Sabsukh and the plaintiff, who had left the village ten years ago, owned a moiety of it, which, in consequence of the absence of the owners, is in the possession of the owners of the other moiety, *viz.*, Hirdey and Dariao themselves; and they go on to say that they have given possession of one-half of their own share and of one-half of the share of the absent owners to the present defendant; and that, when Sabsukh and Sirdar return to the village and claim their property, "we three who are in possession shall give up the eight annas share of the aforesaid persons." The latter provision is remarkable as indicating the care taken when making over a portion of the share of the absent owners to a third party to secure the restoration of that portion as well as of the portion retained by themselves when reclaimed by the owners: and such solicitude on their part is most reasonably explained by the hypothesis that they were bound to restore the share when reclaimed and were sensible of the obligation. It is to be observed that Sabsukh and Sirdar were not strangers to them, nor merely co-sharers but near blood relations, probably residing together on the same premises and partners in agricultural labours. When two members of a family leave their home in search of service, it is less easy to conceive that they should abandon their landed property without making any sort of arrangement about it to be seized upon as a waif or stray by anybody, than to suppose that they may have intrusted it to their cousins and co-sharers on such an understanding as seems to be recognized and admitted by the latter in the *wajib-ul-arz*. Having regard to the circumstances and the tenor of the *wajib-ul-arz*, although no express mention of a trust is found therein or in the plaint, I think that it would have been proper to examine the plaintiff and his cousins Hirdey and Dariao and to make further inquiry with the view of elucidating the nature of their acquisition of the share and of their subsequent possession. Without such inquiry we are hardly in a position to dispose of the plea in appeal. I would therefore desire the lower appellate Court to try and determine (i) with reference to the instrument executed in 1929 Sambat (April 1872—March 1873) in favour of Mannu Lal and others whether the plaintiff has any *locus standi* and right of suit: and should that issue be decided affirmatively to try and determine (ii) whether

Hirdey and Dariao received the share in suit and held it in trust on an agreement to return it when reclaimed: and should that issue be decided affirmatively to try and determine (iii) whether in 1923 Sambat (March 1864—April 1867) the defendant had offered to return it to the plaintiff, but that the latter had refused to have anything to do with it, and to submit its findings.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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WHYMPER AND CO. (PLAINTIFFS) v. BUCKLE AND CO. (DEFENDANTS).*

Contract—Condition Precedent—Formally signed contract.

Where two parties have come to a final agreement, the mere fact that at the time of their doing so they intend to embody the terms of such agreement in a formal instrument does not make such agreement less binding on them.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Spankie, J.

Messrs. *Howard and Hill* for the appellants.

Messrs. *Conlan and Quarry* for the respondents.

The following judgments were delivered by the High Court:—

SPANKIE, J.—This was a suit to recover Rs. 32,284-12-0 on the part of Messrs. Whympers and Co. of the Crown Brewery, Mussoorie, against Messrs. Buckle and Co., merchants of Saharanpur and Mussoorie, for whom the senior partner, Mr. Stowell, one of the defendants, is agent at Mussoorie. The action is brought upon an alleged contract made between the parties on or about the 20th December 1877. The defendants deny that any contract was actually made, but admit that Rs. 2,539-8-6 are due by them as regular customers of the plaintiffs. The main issue between the parties was whether, as averred by the plaintiffs, there was a binding and complete contract, or, as contended by the defendants, there was a precedent condition that the contract should not be considered complete and binding until a written agreement had been formally executed by the parties? The issues in the entire case were thus settled by the lower Court:—“(i). Was such a

* First Appeal, No. 143 of 1178, from a decree of F. B. Bullock, Esq., Subordinate Judge of Dehra Dún, dated the 3rd September 1878. Reported under the special orders of the Hon'ble the Chief Justice.

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contract as that alleged by the plaintiffs to have been made ever entered into between the plaintiffs and defendants? (ii). If so, if its validity affected by any representations made by the plaintiffs to induce defendants to enter into it? (iii). If entered into, and if valid, has there been a breach of the contract, and if so, by whom was the breach effected? (iv). Should the sum of Rs. 6,000 stated as liquidated damages be awarded, and to whom? (v). If there was a contract, what was the amount of beer supplied under it, and what was the value of it"? The lower Court thus sets out the whole circumstances that led up to the point at which it is alleged a contract was made between the contending parties.

The Crown Brewery was started by Messrs. Whympers and Co. in the latter half of the year 1876, and Messrs. Buckle and Co., even before the Brewery was established, had some desire to become agents for the sale of the beer. Nothing, however, came of the first proposals made in 1876, and Whympers and Co. disposed of the first year's brew, that of 1876-77, themselves. Buckle and Co. bought considerable quantities on their own responsibility as general dealers. In the beginning of November 1877, there was a conversation between J. W. Whympers and Stowell, of which the result was a letter from the plaintiffs embodying the terms of a proposed agreement. The defendants after some delay sent a reply declining the terms proposed. On the 7th December J. W. Whympers and Stowell had another conversation, in the course of which it would appear that the latter remarked that he was afraid to take so large a quantity as one hundred hogsheads a month, as had been suggested by the former. On being reassured by Whympers as to the quantity of the sales made by him in the previous year, Stowell thought that he might take sixty hogsheads or a little more. This interview led to another letter, written by the defendants, dated the 8th December, to the plaintiffs, saying that they were prepared to take sixty hogsheads for six months, and ninety hogsheads for the second period of six months, monthly. This letter the Judge rightly calls an important one. It contains a clause that before signing any covenant Stowell and Co. would like a more explicit agreement about beer that may be returned, &c. There was also another to this effect: "We would also ask you to insert a clause saying,

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&c.” The plaintiffs on the 9th December 1877 (not 1878 as stated in the printed books) replied agreeing to certain points mentioned in the letter of defendants, and proposing to consult Mr. Quarry (a pleader) as to the liquidated damages in case of failure to carry out the contract by either party. On the 20th December Whympers and Stowell met at the office of Buckle and Co. in Mussoorie, and Whympers gave to Stowell a letter containing a guarantee that the beer supplied should stand sound and saleable for twelve months from delivery, and agreeing that Quarry should settle the liquidated damages. At the same time Stowell wrote to plaintiffs:—“We will at once have the agreement made out on the terms proposed.” On the 21st Stowell wrote to Whympers saying that he had seen Quarry and had given instructions as to the drafting of an agreement. This letter must have been in reply to one of the same date from Whympers asking that the guarantee as to the beer standing good should be modified, so as to refer to that supplied in hogsheads only and kept at Rajpur, Dehra, or Mussoorie. From this letter, the lower Court observes, it is quite evident that Whympers considered that he was at liberty to modify or alter agreements subject to the signing of an agreement. On the 22nd December Whympers went to Dehra and had an interview with Stowell and Quarry, and Rs. 6,000 were fixed as liquidated damages, and Quarry was instructed to draw up an agreement. Whympers left for Murree. On the 4th January, immediately on his return from Murree, Whympers wrote to defendants, asking for a list of agencies which defendants proposed to start, as he wished to alter the advertisements in the papers. Defendants reply on the 7th January, saying that they think it will be as well to let matters remain as they are until Quarry has made out the necessary deed. On the 12th January Whympers sent an order for beer from Umballa to defendants saying: “We should supply it direct ourselves, but for our agreement with you.” He also sent a letter to the effect that he had altered his advertisement in the “Pioneer” and “Delhi Gazette.” Stowell replied to these letters that until they had “actually entered into an agreement they would much prefer letting matters stand as they are.” On the 13th January plaintiffs wrote that they were losing business in not supplying orders, and “they presumed that defendants

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would have no objection to their supplying orders in stations in which defendants had not yet established agencies." Defendants relied at once on the 16th January: "By all means supply any orders you may get, for we do not consider we have entered into any agreement until we have actually signed the one Mr. Quarry is making out." On the 16th January plaintiffs wrote to defendants: "We are very much surprised at the view you express: we consider the agreement as already entered into, &c. &c." On the 17th January Whympers received a rough draft of the agreement drawn up by Quarry with Stowell's remarks on it. Whympers made remarks on the draft agreement, as well as Stowell, and the Judge observes that it is evident from their remarks that several important points required further consideration; one of these was whether the guarantee regarding the beer standing good should hold generally or only in respect to beer kept in Dehra, Rajpur, and Mussoorie. Whympers wrote on the 18th January denying Stowell's right to make any alteration in the agreement, and again on the 21st January saying that he considered "a contract was now existing." Up to this time the Judge considers that Stowell most undoubtedly had been anxious to enter into an agreement, but complaints received in the latter end of January led him to believe that the brew of the year was not very good. The correspondence between the parties almost ceased from the 20th January to 1st February, and it is evident that there was a period of indecision in Stowell's mind as to the advisability of entering into a contract. After the 1st February Stowell appears to have recovered his former temper with regard to the contract, and the correspondence through February and March points to a mutual desire on the part both of plaintiffs and defendants to do business as though a contract would be eventually entered into, though for some reason, which does not clearly transpire in the evidence or in the correspondence, the draft deed was never finally made into a deed for signature by the contracting parties. Complaints during March became a little more frequent as to the quality of the beer. On the 2nd April Stowell wrote to plaintiff "reluctantly declining to receive any more beer." All negotiations were closed on the 11th April by a letter from Quarry in the character of the legal adviser of defendants. Such, remarks the lower Court,

is a resumé of the whole negotiation between the plaintiffs and defendants, as shown by a lengthy correspondence and sustained by the evidence of the two principals. The lower Court now proceeds to its judgment. The Judge observes that it is admitted by plaintiffs as well as by defendants that from the first it was agreed that the agreement should be reduced to a formal deed, and moreover that this was the subject of their conversation on the 7th December 1877. Whympcr, however, in his oral evidence says that he did not make this agreement as a condition precedent to the acceptance of the agreement, though he admits that he alluded to this deed in that correspondence. Stowell on the contrary most distinctly says that on the 7th December he gave Whympcr to understand that he considered the execution of a formal deed a necessary and vital preliminary to the completion of the contract. As both those gentlemen are parties to the suit and interested in this important point, it was necessary to note how far their statements are borne out by the correspondence and probabilities of the case. For this purpose the lower Court refers to Stowell's letter of the 8th December, to Whympcr's letters of the 14th December and 20th December, and to the letter of the defendants dated the 20th December, which in the opinion of the Court was a most important one. These letters are referred to above. The plaintiffs' counsel contended that this letter of the 20th December was an acceptance of all the previous proposals, including the guarantee, and that it was the final agreement and acceptance of the contract. But the Judge thought otherwise, as the very wording of the letter—"We will at once have the *agreement* made out on the terms *proposed*"—shows that it alludes to the *agreement* or covenant or deed which had been in the defendant's mind from the date of his letter of the 8th December. The word "agreement" is the word that has been used by both parties when alluding to a written deed. The lower Court then refers to Whympcr's letter of the 4th January which it calls Stowell's first opportunity of saying that he considered a deed necessary to the agreement in the correspondence, and he at once took advantage of it. The Judge also remarks that defendants are still insisting upon the necessity for a written agreement as was shown from Stowell's letter of the 16th January. It is evident, the Court observes, that Stowell from the very first con-

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sidered the signing of an agreement as essential to the completion of the contract and took every opportunity of pointing this out to Whympers in his letters. Whympers disregarded the first two or three expressions of this opinion made by Stowell, and it was not until Stowell, in so many words, wrote that he did not consider that he had entered into an agreement that he expressed his surprise at the opinion. The lower Court then says:—"So far this Court is of opinion that the correspondence and evidence both point to the conclusion that the signing of an agreement was antecedent to the completion of a contract. Taking the probabilities of the case, the same opinion must be arrived at. Mr. Stowell is an old man of business, having had 20 years' experience; he knew well the importance of a definite agreement on all points, and was not likely to commit himself to an agreement rashly. If this contract is to be looked upon as entered into and in operation from the 1st January 1877, we must imagine Mr. Stowell rushed into it, without a single agency open in the down-country stations, and prepared to receive sixty hogsheads a month without any immediate means of disposing of his beer. Again the draft agreement is open to objection to both contracting parties from their own point of view, and it is evident from their memoranda that the agreement was neither definite nor complete. Mr. Whympers, a young, pushing, but inexperienced man of business, was naturally eager to conclude the agreement and to consider it concluded, having, as he thought, got rid of a large quantity of his year's brew, and from the first his sanguine view of the matter led him into this belief. But taking the probabilities of this question into consideration, it appears improbable that Mr. Stowell should have so committed himself as it is urged by the plaintiffs he did by his letter of the 20th December." In order to convert a proposal into a promise the acceptance must be (i) absolute and unqualified, (ii) be expressed in some usual and reasonable manner unless the proposal prescribes the manner of acceptance. As to the first condition it was evident that the acceptance of the 20th was qualified by the plaintiff's letter regarding the guarantee, which was a qualification of an essential character, and though the qualification was embodied in the draft agreement, this was quite consistent with the defendant's position that the draft agreement was open to discussion and amendment. As to

the second condition, the lower Court referred to a case in the House of Lords in which it was held that "the sending of an agreement to a solicitor to reduce it into form is rather evidence that the parties do not intend to bind themselves until it is reduced into form (1)." He also cites Mr. (now Mr. Justice) Cunningham's edition of the Indian Contract Act, in which it is stated that the reasonable rule seems to be that the intention to reduce terms into a formal writing is some evidence that the parties do not consider the contract concluded. These rulings the lower Court accepts and holds that the facts of the case are such that the rule applies to them. In regard to the good faith of the parties the Judge entertained no doubt. He states that the only point that could be open to misconstruction throughout the proceeding was the delay between the 21st January and the final breaking off the negotiations in April, and in signing the agreement. Mr. Stowell had explained this delay, saying that he got complaints as to the quality of the beer, and the smallness of the sales led him to hesitate. The Judge remarks that he was particularly struck by the straightforward manner in which Mr. Stowell gave his answers throughout his examination. The lower Court thus states its conclusion on the point that "there was no final contract entered into by the plaintiffs and defendants, inasmuch as it was agreed from the first that the agreement should be reduced into a formal deed and be signed by the contracting parties, as a condition antecedent to the completion of a contract." This conclusion, the Judge observes, practically disposes of the remaining issues. But on the second issue the lower Court gives its opinion that Stowell made his modified offer to take sixty hogsheads and ninety hogsheads on Whymper's assurance that the previous year he had disposed of forty hogsheads a month. The plaintiff (Whymper) thinks that he said thirty hogsheads a month. But the Court had very little doubt that Stowell was right and Whymper said forty hogsheads. For Whymper had actually written a memorandum in which he entered his sales to the public as three hundred and ten hogsheads in ten months; whereas the issue book of the plaintiffs shows by an abstract made by defendants this was more than three times the amount of the actual sales to the public, which in reality amounted

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to ninety-two hogsheads only. So that even if there had been a contract this misrepresentation would have been sufficient to render it void. There remained for consideration the value of the beer actually taken by the defendants as customers of plaintiffs under former arrangements. In spite of Stowell's repeated declarations that he wished matters to remain as they were till a deed was signed, the plaintiffs without orders in accordance with the terms of the agreement continued to send down beer in hogsheads to Rajpur, without sending an invoice or notice to defendants, addressed to the defendants, at the rate of sixty hogsheads a month. The beer was stored in Whympers godown, and delivery of it was never given to or taken by defendants. The despatch of beer continued from the 1st January to the 15th April, and the plaintiffs have claimed the value of this beer, supplied as it had been in an irregular way. The Court could not allow the value of this beer to plaintiffs. It was in their godown and they could resume it. As regards beer supplied outside the contract, and for which defendants are willing to pay, it appeared to the Court inconvenient to fix (?) any specific price, as there had been no separate accounts filed by plaintiffs, and any decree that could be given would be on the one-sided statement of defendants. The lower Court dismissed the claim altogether and with costs.

The plaintiffs contend in appeal (i) that the Judge has erred in holding that no contract subsisted between the parties to the suit; (ii) that the Judge has erred in holding the execution of a written agreement to have been a condition precedent to the formation of a contract between the parties; (iii) that the Judge has erred in finding that the agreement between the parties was based upon misrepresentations made by the plaintiffs to the defendants; (iv) that, assuming the contract between the parties to have been based upon misrepresentation, the defendants were not justified in refusing to perform their part of the contract; and (v) that the Judge was wrong in finding that there had been no effectual delivery of the beer supplied under the contract. The learned counsel on behalf of appellants has cited various authorities in support of his argument, that the mere mention of a deed of agreement in the written acceptance of a tender

would not relieve the parties from the obligation to carry out the terms of an agreement once come to, if they had the intention of entering into an agreement, and if the object of a subsequently prepared written contract was simply for the purpose of putting the agreement already arrived at into formal shape (1). He regarded the letter of the 20th December as the acceptance, pure and simple, of the proposal made by plaintiffs. The written agreement was to embody those minor points, which it would be convenient to have recorded for future guidance, being either ancillary to the main agreement already reached, or explanatory of the way in which it was to be carried out. He relied on the authority of the Master of the Rolls to the effect that, where a proposal or agreement made in writing is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail (2). Mr. Justice Fry has remarked that a long series of cases had established the proposition that the mere reference to a future contract is not enough to negative the existence of a present one (3). In all the cases cited to us the principle is substantially the same. We notice in *Rossiter v. Miller* (4) that Lord Chief Justice Coleridge refers to some remarks of Lord Westbury upon some cited cases which, he said, "establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual consent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this

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(1) *Lewis v. Brass*, L. R., 3 Q. B. D., 667; *Winn v. Bull*, L. R., 7 Ch. D., 29; *Bonnevell v. Jenkins*, L. R., 8 Ch. D., 70; *Crossley v. Maycock*, L. R., 18 Eq., 180; *Jones v. The Victoria Graving Dock Co.*, L. R., 2 Q. B. D., 314; *Rossiter v. Miller*, L. R., 5 Ch. D., 648; *Chinnock v. Marchioness of Ely*, 4 D. J. & S., 638.

(2) *Winn v. Bull*, L. R., 7 Ch. D., at p. 32.

(3) *Bonnevell v. Jenkins*, L. R., 8 Ch. D., at p. 72.

(4) L. R., 5 Ch. D., 648.

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Court requires to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

It was also urged that circumstances in the conduct of the parties may establish a binding contract between them, although the agreement reduced to writing in a draft has not been formally executed by either. This argument is supported by the authority cited (1), and it would apply to the case before us if it be shown by evidence that defendants had by their course of dealing the continuance of their correspondence practically acted under the contract alleged by the plaintiffs. In the case cited Lord Cairns remarks:—"I must say that having read with great care the whole of this correspondence, there appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order * * *. Those are the grounds which lead me to think that there having been clearly a *consensus* between these parties, arrived at and expressed by the document signed by Mr. *Brogden*, subject only to approbation, on the part of the company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. *Brogden & Co.* in the supply of coals."

With all this authority before us we may safely conclude that, unless the defendants can show that by mutual consent there was a condition antecedent to a contract to the effect that there should be no binding agreement until a written contract had been executed by the parties or that the assent communicated in their letter of the 20th December 1877, was subject to the provision as to a written contract, then, assuming that any agreement has been proved,

(1) *Brogden v. The Directors of the Metropolitan Railway*, L. R., 2 Ap. Ca., N. S., 666.

that agreement would be binding upon the parties. The case therefore must stand or fall to pieces on the evidence. We must look to the evidence, the correspondence which passed between the parties, and to their conduct and course of dealing as shown by the evidence and during the correspondence, in order to determine the propriety of affirming or reversing the decision of the Court below on the merits. (The learned Judge then proceeded to consider the correspondence which had passed between the parties and the oral evidence on the record and then continued as follows) :—There cannot, with all the evidence before us, be, I think, any reasonable doubt that there was no antecedent condition to a binding treaty that there should be a written deed of contract executed by the parties, and that any assent to the proposed terms, even if agreed to, should be subject to the proviso that there must be a written instrument signed before the contract would begin to operate. Applying therefore the authorities already cited to this case, I must hold that defendants have failed to establish their defence that there was no subsisting agreement between themselves and plaintiffs on and after the 1st January 1878. I will now show that, whilst one party is doing all he can to carry out the contract, the other is hanging back and throwing difficulties in the way of a faithful performance of it. (After examining the evidence showing these facts, the learned Judge continued) :—Thus far I have established that there was no condition antecedent to the contract; that there was a binding agreement made on the 20th December; and that it was acted upon; and finally that it was repudiated by defendants altogether. We have now to consider whether there was any misrepresentation on the part of the plaintiffs which induced defendants to accept the proposals of the former, and if there was whether the defendants were or were not justified in refusing to perform their part of the contract. (After considering the question of misrepresentation and the question whether the defendants were justified in putting an end to the agreement on the ground that the beer supplied to them was bad in quality, and deciding these questions against the defendants, the learned Judge concluded his judgment in the following terms) :—As I find that defendants broke the contract, and I consider that plaintiffs have fully established their case, I think that they are

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entitled to a decree as claimed with costs against the defendants. Since I prepared this judgment I have had an opportunity of seeing that of the Hon'ble the Chief Justice which appears to agree with the conclusion at which I have arrived.

STUART, C.J.—In this case the Subordinate Judge has gone clearly wrong. He appears to have been of opinion that no contract of the kind alleged in the plaint could be made and completed without a formal agreement in writing, and that such writing, and nothing else, was the contract itself. This mistaken notion on the part of the Subordinate Judge unfortunately took strong possession of his mind, and it not only colours but explains his judgment. For instance, the first issue he framed was this:—"Was such a contract, as is alleged by the plaintiffs to have been made, ever entered into between the plaintiffs and defendants"; and in reference to this issue his first observation is:—"The first of these issues is the point on which the case turns, and to consider it properly it is necessary to analyse and bring together the whole circumstances that led up to the transaction which it was alleged formed the contract between the contending parties as it is shown in the evidence." It would have been more correct if he had said that it was necessary to consider the evidence of the circumstances, not that led up to, but actually constituted, the transaction which was the contract. The contract was evidently something which in his mind was yet to come, and he could not see that the agreement or contract, relied upon by the plaintiffs had been made and was a complete contract in itself. That such a view of the law of contracts is altogether erroneous cannot be doubted. The Indian Contract Act, IX of 1872, embraces the greater part of the recognized law of contracts, but it does not, within itself, adopt the whole body of that law, for true to its preamble, which declares that, "whereas it is expedient to define and amend *certain parts* of the law relating to contracts," it excludes from its provisions all those subtleties to which the English Statute of Frauds has given rise, and certain classes of contracts which are scarcely necessary for the business of this country, but which, should occasion so require, might be applied here, and which this preamble clearly saves. In fact the Indian Contract Act may be said to deal with two large classes of

transactions, those which fall under the wide and general definition contained in s. 2 and the first part of s. 10, and those other transactions or agreements in writing referred to and saved by the latter portion of s. 10, and those written agreements which have to be considered under s. 25. S. 2 defines a contract to be an agreement enforceable by law, a rather wide definition, which if taken by itself does not add much to our information on the subject, but if read in connection with other parts of the same section it can be seen that that contemplates such a contract as we have in this case, and which is also an agreement and contract within the meaning of the first part of s. 10 of the Act, which provides that "all agreements are contracts if they are made with the free consent of parties competent to contract for a lawful consideration and with a lawful object," what in fact is known as one of that large class of agreements which in the law of England go under the definition of simple contracts. The contract in the present case is such a simple contract, not an express contract in writing, but *rebus ipsis et factis*, in other words, a contract made by the conduct of the parties, by their correspondence, by evidence of their personal intercourse on the subject of the contract, and by any facts and circumstances showing an agreement of mind in the matter. And any formal or written agreement which may have been ultimately intended is to be looked at merely as the record of that which had already been agreed upon, and not as the agreement or contract itself. Several cases in support of this view of the law were referred to at the hearing. In the case of *Brogden v. The Directors of the Metropolitan Railway* (1), decided on the 16th July 1877, the law on this subject is very clearly laid down by the Lord Chancellor (Cairns) in the following terms:—"My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most

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solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form." To the same effect is the ruling in *Lewis v. Brass* (1). In this case it was held that a tender and letter of acceptance formed a complete contract although a written deed of agreement was contemplated by the letter conveying the acceptance. The same was ruled in *Bonnevell v. Jenkins* (2). In *Jones v. The Victoria Graving Dock Co.* (3) it was held that a draft agreement modified by another paper was a valid contract within s. 4 of the Statute of Frauds, although a resolution was at the same adopted that the said agreement be endorsed in duplicate, signed, sealed, and executed. In *Crossley v. Maycock* (4), before the Master of the Rolls (Sir George Jessel), the agreement between the parties was qualified by certain conditions, and the Court accordingly held that no final agreement had been made which could be enforced, but in delivering judgment Sir George Jessel laid down the principle of the law of contracts entirely in accordance with the other cases to which I have referred. He said: "The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at." In *Winn v. Bull* (5), before the Master of the Rolls, a written agreement relating to a lease of a dwelling-house and premises for a term of seven years was made "subject to the preparation and approval of a formal contract," and applying that condition to the case Sir George Jessel held that no final agreement had been made. But in delivering judgment His Lordship referred with approbation to the decision in the case of *Chinnock v. Marchioness of Ely* (6) of Lord Westbury in which His Lordship said:—"I entirely accept the doctrine * * * that, if there had been a final agreement and the terms of it are evidenced in

(1) L. R., 3 Q. B. D., 667

(2) L. R., 8 Ch. D., 70.

(3) L. R., 2 Q. B. D., 314.

(4) L. R., 18 Eq., 180.

(5) L. R., 7 Ch. D., 29.

(6) 4 D. J. & S., 638.

a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." In *Winn v. Bull* (1) the case of *Rossiter v. Miller* (2) was referred to. Lord Coleridge, Chief Justice, laid down with the approbation of Lord Justice James and Lord Justice Baggallay, who heard the case with him, that, "as soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract." The law therefore on the subject of these contracts is perfectly clear, and applying it to the present case we have to consider whether on the facts and evidence before us there is to be found a contract or agreement binding on the parties. (The learned Chief Justice then proceeded to consider the correspondence which had passed between the parties and the oral evidence on the record, and then continued as follows):— There being therefore no room for objection on the score of the inferior quality of the beer, nor any sufficient ground for the plea of misrepresentation, the only question for serious consideration is whether the facts and the evidence which I have detailed show a legal contract between the parties which may be enforced. I am clearly of opinion that such a contract is shown and that the facts come within the principle of the authorities to which I have already adverted. I would therefore allow the plaintiff's claim with interest thereon at twelve per cent. up to the date of the decree of this Court and thereafter and till realization at six per cent. per annum, the particulars of which appear to be correctly stated in the plaint, and Rs. 6,000 as the liquidated damages agreed to be paid by the party guilty of breach of the contract, and reversing the judgment of the Subordinate Judge decree the present appeal with costs in both Courts.

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Appeal allowed.

(1) L. R., 7 Ch. D., 29. (2) L. R., 5 Ch. D., 648.

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January 10.

Before Mr. Justice Oldfield and Mr. Justice Straight.

KHAIR-UN-NISSA (JUDGMENT-DEBTOR) v. GAURI SHANKAR
(DECREE-HOLDER).*

Application for execution of decree—Step in aid of execution—Act XV of 1877 (Limitation Act), sch. ii, No. 179.

G sued *K*, as the legal representative of her deceased husband *S*, on a bond executed by *S* in his favour, and obtained a decree. Subsequently he sued *K* on a bond which she had personally executed in his favour, and obtained a decree. On the 7th September 1875, he applied for execution of both these decrees, and *S*'s landed estate, which stood recorded in *K*'s name, was attached. This estate was sold on the 20th February 1877, being put up for sale in one lot, in satisfaction of both decrees, in accordance with an application made by *G* on the 16th February, and was purchased by *G* for the amount of the decrees. This sale was subsequently confirmed, and on the 10th December 1877, satisfaction of the decrees was entered up, and the execution-proceedings struck off the file. Subsequently three of the heirs of *S* in one case, and two in another, instituted suits against *G*, claiming to recover from him such portion of the proceeds of the sale of *S*'s property as had been appropriated to the discharge of *G*'s decree against *M*, and such heirs obtained decrees for certain sums, which *G* was obliged to pay. *G* thereupon on the 16th May 1879, applied for execution of his decree against *M*. *Held* that such application was not one in continuation of that made on the 7th September 1875, but was a fresh application, and the application made by *G* on the 16th February 1877 was not one for a step in aid of execution, within the meaning of No. 179, sch. ii of Act XV of 1877, from which limitation could be computed, and the application of the 16th May 1879 was barred by limitation. *Booboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1); *Paras Ram v. Gardner* (2); and *Issurree Dassie v. Abdool Khatak* (3) distinguished by STRAIGHT, J.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Mr. Conlan for the appellant.

Munshi Hanuman Prasad and *Pandit Bishambhar Nath* for the respondent.

The Court (OLDFIELD, J.) and STRAIGHT, J.) delivered the following judgments:—

STRAIGHT, J.—This is a second appeal from an order of the Judge of Allahabad passed in appeal on the 19th February 1880,

* Second Appeal, No. 36 of 1880, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 19th February 1880, affirming an order of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 16th October 1879.

(1) 23 W. R., 183. (2) I. L. R., 1 All., 355.

(3) I. L. R., 4 Calc., 415.

confirming a decision of the Subordinate Judge, allowing the respondent decree-holder to proceed with execution of a decree against the appellant his judgment-debtor. The facts are as follows:—One Syed Muhammad on the 15th April, 1866, executed a bond to the respondent, Gauri Shankar, pledging his property for an advance of Rs. 5,000. On the 25th November, 1871, the appellant, Khair-un-nissa, his wife, also made an hypothecation to the same person for a loan of Rs. 1,200. After the death of Syed Muhammad, the respondent Gauri Shankar sued Khair-un-nissa, as her husband's legal representative, on the bond of April, 1866, and obtained a decree on the 30th May, 1873. He then brought a second suit against her in respect of her own bond of November, 1871, and got a decree on the 17th March, 1874. On the 7th September, 1875, he applied for execution of both these decrees and attached all the property left by Syed Muhammad, which stood recorded in the name of Khair-un-nissa. It was sold in one lot on the 20th February, 1877, in accordance with an application put in by the decree-holder on the 16th February, 1877; and the amount of his two decrees aggregating Rs. 10,850, the decree-holder purchased for that sum and filed a receipt in full discharge of both of them. Despite objection by the judgment-debtor this sale was in due course confirmed to him, and on the 10th December, 1877, satisfaction was entered up and the execution-proceeding struck off. No point arises in the present appeal with reference to the first decree obtained upon Syed Muhammad's bond of April, 1866, but the questions raised relate to the second decree under which Khair-un-nissa was judgment-debtor in respect of the bond personally executed by her on the 25th November, 1877. It is this decree that the respondent Gauri Shankar is now seeking to execute for the following reasons. Subsequent to the sale in February, 1877, three of the heirs of Syed Muhammad in one case, and two in another, instituted suits against the decree-holder-respondent Gauri Shankar to recover from him such portion of the proceeds of the sale of Syed Muhammad's property as had not been absorbed in satisfying the decree upon his personal bond of the 15th April, 1866. In respect of this they allowed a deduction to the extent claimed by Gauri Shankar, but the residue, which had been

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appropriated to discharge the decree against Khair-un-nissa, they claimed to have paid to them. In the result they severally got decrees on the 17th May, 1878, and the 14th September, 1878, for Rs. 1,259-10-7 and Rs. 1,123-10-0, respectively, and these amounts Gauri Shankar, the respondent, has had to pay. Being thus deprived of the fruits of his execution-sale, so far as his decree against Khair-un-nissa was concerned, he applied on the 16th May, 1879, for leave to again execute it. The judgment-debtor objected that, as satisfaction had been entered up, the execution-proceedings could not be re-opened, and moreover that, three years having elapsed since the last application for execution on the 7th September, 1875, limitation barred. Both the lower Courts disallowed these objections, and the judgment-debtor appeals to this Court, urging the same grounds, and arguing further that the decree-holder by purchasing at the auction-sale merged his character of decree-holder in that of auction-purchaser, and the sale having been regularly completed and satisfaction entered up, there is neither decree-holder to apply for nor decree to put into execution. Stress has been laid upon the application of the 16th February, 1877, but in my opinion this cannot be regarded as an application for a step in aid of execution within art. 179, sch. ii of Act XV. of 1877. Failing to sustain this contention it is then urged for the decree-holder that the application of the 16th May, 1879, was in reality only a step in continuation of the former application of the 7th September, 1875, and that upon the authority of three cases—*Booboo Pyaroc Tuhobildarinee v. Syud Nasir Hossein* (1): *Paras Ram v. Gardner* (2) and *Issurree Dassees v. Abdool Khalak* (3)—the decisions of the lower Courts adopting this view should be upheld. I am of opinion that this argument is a fallacious one and cannot be accepted. It appears to me that all these cases referred to are clearly distinguishable from the present. In *Booboo Pyaroc Tuhobildarinee v. Syud Nasir Hossein* (1) the execution-proceedings were struck off in consequence of a decision being passed adverse to the decree-holder, upon an objection made by a third party, under s. 246 of Act VIII of 1859, in consequence of which he was compelled to bring a regular suit to have the pro-

(1) 23 W. R., 183.

(2) I. L. R., 1 All., 355.

(3) I. L. R., 4 Cal., 416.

party, from which the attachment had been removed, declared to be the property of his judgment-debtor, and then having succeeded in that suit the decree-holder applied for resumption of the execution, which had been interrupted. The same state of facts existed in the case which was made the subject of the Full Bench decision of this Court (1); and in that of *Issurree Dassie v. Abdool Khalak* (2) the judgment-debtor had got a sale set aside and the proceeds refunded by the decree-holder, who thereupon applied to execute his decree afresh. It will thus be observed that in all these cases there was a contest going on either between the decree-holder and a successful objector, or between the decree-holder and the judgment-debtor. But in the matter now before us the decree-holder attached and brought to sale, as the rights and interests of Khair-un-nissa, rights and interests that she did not possess, in other words, she had no saleable interest to bring to sale. He himself having purchased such rights and interests, upon the strength of such purchase gave a receipt in discharge of both his decrees by virtue of which satisfaction was entered up and the execution-proceedings struck off on 10th December, 1877. What has since happened is that in consequence of two regular suits brought against him by the heirs of Syed Muhammad he has had, not to surrender the property purchased by him to the extent of their shares, but to compensate them by a money equivalent. When the sale took place on the 20th February, 1877, Act VIII of 1859 was in force, and there was then no provision such as is now to be found in s. 313 of Act X of 1877. A purchaser at auction-sale at that time took the risk of the judgment-debtor's having a saleable interest, and it does not appear to me that the decree-holder-respondent in the present case is in any better or worse position than an ordinary auction-purchaser. If he had the misfortune to buy something that his judgment-debtor had not to sell, he had only himself to blame for putting up an interest to sale that did not exist. Under such circumstances it would seem that satisfaction was rightly entered up and the execution-proceedings properly struck off. I am therefore of opinion that the application of the 16th May, 1879, was a fresh application, and that, the last antecedent application having been made

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1881 on 7th September, 1875, the decree-holder-respondent is barred from executing his decree. I would accordingly decree the appeal with costs.

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OLDFIELD, J.—I am of opinion that the present application of the 16th May, 1879, on the part of the decree-holder to execute the decree is barred under art. 179, sch. ii of the Limitation Law. I concur with Mr. Justice Straight in holding that it cannot be considered to be a continuation of the application of the 7th September, 1875, but is a fresh application, and I do not consider that the intermediate application made by the decree-holder on the 16th February, 1877, is such an application as is contemplated in art. 179, so as to allow the period to run from its date. I therefore on this ground concur in the proposed order.

Appeal allowed.

Before Mr. Justice Spinkie and Mr. Justice Oldfield.

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January 14. CHATTARSINGH (PLAINTIFF) v. RAM LAL AND ANOTHER (DEFENDANTS).*

Registered and unregistered Documents—Act XIX of 1843—Act VIII of 1871 (Registration Act)—Act III of 1877 (Registration Act), s. 50.

A document executed while Act XIX of 1843 was in force and not registered thereunder cannot be postponed to a document executed in 1873 and registered under Act VIII of 1871.

THIS was a suit in which the plaintiff claimed possession of a certain share in a village called Bannupur. This share had been hypothecated to the plaintiff as collateral security for the payment of two bonds dated the 9th January, 1873, and the 31st December, 1873, respectively, which had been given to him by Sham Lal the brother of the defendants. The plaintiff obtained a decree on these bonds enforcing the hypothecation on the 27th March, 1876. In 1878 the share was put up for sale in execution of this decree and was purchased by the plaintiff, the certificate of sale granted to him bearing date the 23rd December, 1878. When the plaintiff endeavoured to obtain possession of the share he was resisted by the defendants. They claimed by virtue of a lease which had been

* Second Appeal, No. 774 of 1880, from a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 20th April, 1880, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 13th February, 1880.

granted to them by their brother Sham Lal, bearing date the 1st January, 1876; and also as auction-purchasers of the share at a sale which took place on the 20th December, 1878, in execution of a decree dated the 19th May, 1876, which they had obtained against their brother on a bond in which the share was hypothecated dated the 1st February, 1862. The plaintiff consequently brought the present suit against the defendants for possession of the share, and the cancelment of the sale at which the defendants had purchased, and of the lease, alleging that the lease and the bond of the 1st February, 1862, were both fraudulent instruments. The plaintiff's bonds of the 9th January and 31st December, 1873, were registered instruments, while the defendants' bond of the 1st February, 1862, was not registered. The question arose in the case whether or not the latter bond being unregistered should take effect as regards the share against the plaintiff's registered bonds. Both the lower Courts held that that bond should take effect as regards the share as against the plaintiff's registered bonds, notwithstanding it was not registered. Upon this point the lower appellate Court observed as follows: "Then as to the legal plea: if I had been left to myself to put an interpretation on the subject, I should have given it for the plaintiff, against the Subordinate Judge's decision, and have held that it was immaterial that the second bond (or bonds) was registered under a subsequent Registration Act by which the registration thereof was compulsory, inasmuch as Act XIX of 1843 distinctly laid down that a registered bond should have preference to an unregistered one, even though it be of an earlier date and authentic: but an exactly applicable precedent, in a precisely similar case, has been pointed out to me in the case of *Khandu Dubladas v. Tarachand Amarchand* (1), which takes the other view, and by which, specially as it agrees with the finding of the Subordinate Judge, I consider I must be guided, when no other precedent whatever even partially applicable has been shown by the pleader of the appellant taking the other (my) view." On second appeal by the plaintiff it was contended on his behalf that his bonds being registered should take effect as regards the property in suit as against the unregistered bond of the defendants.

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Pandit *Ajudhia Nath* and Munshi *Sukh Ram* for the appellant.

(1) I. L. R., 1 Bom., 574.

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Mr. *Howell* and Babu *Oprokash Chandar Mukarji* for the respondents.

The Court (SPANKIE, J., and OLDFIELD, J.) remanded the case to the lower appellate Court for the trial of certain issues set out in the order of remand, the portion of the order of remand material to the contention above set out being as follows:—

SPANKIE, J.—The Full Bench judgment of this Court in *Chuterdharee Misser v. Nursingh Dutt Sookool* (1) ruled that a deed creating an interest in immoveable property exceeding in value Rs. 100, executed prior to the 1st January, 1865, is not affected by Act XVI of 1864, s. 13, although it may be registered under s. 17. All former Acts and Regulations having been repealed except in respect of registered instruments, an unregistered deed creating an interest in immoveable property exceeding in value Rs. 100, executed prior to the 1st January, 1865, is not by any provision of Act XVI of 1864 postponed to a registered instrument executed subsequently to that date. We think that the ruling is strictly applicable to the present case, and that an unregistered document executed when the Act of 1843 was in force cannot be postponed to a registered document executed in 1873. Therefore the first plea fails.

PRIVY COUNCIL.

P. C.*
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MUHAMMAD FAIZ AHMAD KHAN (DEFENDANT) v. GHULAM AHMAD KHAN AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of the North-Western Provinces at Allahabad.]

Muhammadian law—Construction of instrument of gift.

One of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her. By another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows:—"I declare and record that the aforesaid sister-in-law may manage the said villages for

* *Present*:—SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR R. COUCH.

(1) N.-W. P. H. C. Rep., 1868, p. 371.

herself and apply their income to meet her necessary expenses and to pay the Government revenue."

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Held that these words did not cut down previous words of gift to what in the Muhammadan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil-ewaz*, or gift for consideration, granting the villages absolutely.

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APPEAL against a decree of the High Court of the North-Western Provinces (11th July 1877) in part reversing and in part affirming a decree of the Subordinate Judge of Aligarh (25th May, 1876).

The question raised by this appeal related to the construction of two instruments of gift according to Muhammadan law. One was a deed of gift executed by the appellant granting two villages, Sahauli and Kamalabad, to Wali-un-nissa the widow of his deceased brother, she having become entitled on the death of her husband to a fourth part of his share in the ancestral estate of the family. Wali-un-nissa died leaving the respondents her heirs, and this suit was brought by them to obtain possession of the two villages, so granted to her, which had been taken back, wrongfully it was alleged, by the defendant on her death. The defence was that the villages had not been granted to the widow for any estate greater than for her life; but had been granted by way of *ariat*, for her maintenance, and not by way of *hibbah-bil-ewaz*, or absolutely. It was alleged for the defence that no heritable estate had, upon the right construction of the instruments executed between the parties, been created. Both the Courts in India held that the instruments showed an absolute gift of the villages to the widow, and a decree for their possession was made in favour of the respondents. The facts of the case are stated in their Lordships' judgment.

The following is the judgment of the Subordinate Judge of Aligarh, in regard to the distinction between *hibbah* and *ariat* :—

"The material point to be decided is, whether the villages of Sahauli and Kamalabad were given to the Musammat as *ariat* or as a gift, and whether the defendant is entitled to take them back. Along with the above it will also be necessary to

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decide the nature of the gift, whether it was with or without consideration. The Court will first define *hibbah* and *ariat*, and detail the circumstances thereof as far they are applicable to, and bear upon, the present case. To make a person the owner of the substance of a thing without consideration is a *hibbah* (gift), while to make him the owner of the profits only without consideration is an *ariat* or *commodatum* (*vide* Dúr-ul-Mukhtar, Kitab-ul-*hibbah*).^{*} In a gift it is essential that the donor should be sane, owner and of age, that the thing given be not undivided (*mushaa*), and be in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions; on the contrary, the conditions are void. For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid (Dúr-ul-Mukhtar, Kitab-ul-*hibbah*).[†] In an *ariat* it is not necessary that the donor should be of age, nor that the thing given should not be undivided, nor is acceptance after proposal a condition (Alamgiri).[‡] In the *Imadia* it is explained that the *ariat* of a joint property is valid, and so are its deposit and sale.—(Dúr-ul-Mukhtar, Kitab-ul-*ariat*.) The words by which an *ariat* is constituted have a special chapter assigned to them in the *Alamgiri*, and I shall copy it in this place to show what words are used in giving a thing in *ariat*, and of what signification:—

(Second Chapter, Kitab-ul-*ariat*, *Alamgiri*):—If he said, ‘I have made thee owner of the profits of this house for a month,’ or, without saying ‘a month,’ ‘without a consideration,’ it will be an *ariat*. This is in the *Fatwas* of Kazi Khan. And it is valid by the words—‘I lent thee this robe, thou mayest wear it for a day, or I lent thee this house, thou mayest live therein for a year.’—(Tatarkhanía.) If he said, ‘I make this house of mine thy

* “It is the *tamlik* (making one the proprietor) of the substance for nothing, i. e., without consideration. *Ariat*. It is the *tamlik* of profits for nothing (without consideration).”

† “The conditions of its validity in the donee are sanity, majority, and ownership. The conditions of validity in the subject of the gift are that it be possessed and not joint. Its pillars are proposal and acceptance. Its effect is that it is not rendered void by invalidating conditions. Accordingly, the gift of a slave, on condition of his being set free, is correct, and the condition is void.”

‡ “As to acceptance by the person to whom anything is given in *ariat*, it is not one of the conditions according to the approval of our three doctors.”

“As to majority, it is not one of the conditions, so much so, that it is valid from an authorized child.”

residence for one month,' or, if he said, 'thy residence for my lifetime,' this will be an *ariat*.—(This is in the *Zahiria*.) And if he said, 'I made thee be borne on her for God's sake,' it is an *ariat*.—(Fatawas Kazi Khan.) And if he said, 'my house is for thee a gift by way of residence,' or, 'a residence by way of gift,' it is an *ariat*.—This is so in the *Hidaya*. And if he said, 'my house is for thee given by way of a residence,' or, 'a residence by way of *sadqa* (alms),' or, 'a *sadqa* by way of *ariat*,' or, a 'loan (*ariat*) by way of gift,' all this is *ariat*.—This is so in the *Kafi*. And if he said, 'my house is for thee, if thou survivest me, and for me if I survive thee,' or, 'for thee a *wakf*,' it is an *ariat* according to Abu Hanifa and Muhammad, but a gift according to Abu Yusuf, and the words '*rakba*' and '*habas*' are void.—This is so in *Badaya*. If he said, 'my house is for thee, if thou outlivest me, and for me, if I outlive thee,' or, 'a *wakf* for thee,' it will be an *ariat* according to all. This is so in *Yanabia*. 'I made over this ass to thee, so that thou mayest use it and feed him with grass at thy own cost,' this will be an *ariat*. This is so in *Kania*. If he said, 'I have given thee this tree for eating the fruit thereof,' it is an *ariat*, unless he intends a gift by it. This is so in *Tamar Tashi*.

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These are the words from which an *ariat* is construed, and it will also appear from looking at all of them that the word '*wahabto*' (I made a gift) is not found anywhere among them. The words '*hibbahtan suknah*' or '*suknah hibbahtan*,' which are used above, do not mean a gift of the substance of the thing. They are only an elucidation of '*dari laka*,' so that the meaning is that the house which is given is given for residence. I shall now give those words which constitute a gift, and they are of three kinds. First, those which are specially made (adapted) for a gift; secondly, those which denote a gift metaphorically or by implication; and thirdly, those which import *hibbah* or *ariat* equally. I copy the following from the *Alamgiri*, *Kitab-ul-hibbah*, Chapter I:—The words by which a gift is made are of three kinds; first, those which are specially adapted or made for *hibbah*: secondly, those which denote *hibbah* by implication or metaphorically; and thirdly, those which may import *hibbah* or *ariat* equally. Of the first kind there are such as these:—'I made a gift of this thing to thee,

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or 'I made thee owner of it,' or 'I made it for thee,' or 'this is for thee,' or 'I bestowed upon thee or gave thee this.' All this is *hibbah*. Of the second description are such as these—'I clothed thee in this garment,' or 'I gave thee this house for thy lifetime.' This is gift. In the same way if he said, 'this house is for thee for my age,' or 'for thy age,' or 'for my lifetime,' or 'for thy lifetime, so that when thou art dead it will revert to me,' then the gift will be valid and the condition void. But the third kind are such as these—should he say, 'this house is for thee, or for me, if I survive thee, or a *wakf* for thee,' and make it over to him, it is an *ariat* according to the two Abu Hanifa and Muhammad, and a *hibbah* (gift) according to Abu Yusuf. The above question shows that the word "*wahabto*," the meaning of which is 'I made a gift of,' is a word specially adapted for gift (*hibbah*), and it not used to denote a loan. And this is the word which has been used in the document entitled *hibbah-nama*, deed of gift. None of the doubtful words have been used in this document and the words used after it are by way of advice (*mashwara*). There is an example in the law-books eminently applicable to the present case which makes it clear that the transaction in dispute was one of *hibbah* and not of *ariat*. This example is to be found in all the books; in the *Hidaya*, in the *Dur-ul-Mukhtar*, and in the *Alamgiri*:—'*dari laka hibbahtan taskunahu*.' 'My house is for thee by way of gift that thou mayest live in it.' It is a rule in Arabic that a verb sentence is never used as explicative (*tafsir*) of a noun sentence; '*dari laka hibbahtan*' is a noun sentence, and '*taskunahu*' a verb sentence; '*taskunahu*' cannot therefore be explicative of the preceding sentence. On the contrary, the donor, by way of advice, counsels the donee to live in it; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made, the following appears in the law-books:—*Dur-ul-Mukhtar*, 'my house is for thee that thou mayest live in it.' Because the words 'that thou mayest live' (*taskunahu*) are an advice, and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So if he likes, he can accept the advice, or he may not accept it. But if it be said, '*dari laka hibbahtan suknah*'

or '*suknah hibbahtan*,' as mentioned in the words used to describe an *ariat*, there '*hibbahtan suknah*' is a *tafsir* or explanation of ownership, contrary to '*dari laka hibbahtan taskunahu*,' where it is not a *tafsir*. Hidaya:—If he said, 'by way of gift, that thou mayest live in it' then it is a gift, for his saying '*taskunahu*,' 'that thou mayest live in it,' is an advice, and not an explanation, and it is an index of the object, unlike his saying '*hibbahtan suknah*, for it is a *tafsir* to it. In the deed of gift, the words 'made a gift of' and 'put her in possession' are followed by the direction, that 'the sister-in-law may manage the villages and apply their income to meet her necessary expenses and to pay the Government revenue;' this is all by way of advice, and the transaction of gift concluded with the preceding words. The words '*hibbah kiyá*' (made a gift of) denote their real meaning, and are made use of with reference to the two villages. It is a rule in every language that a word is always understood to be used in its literal meaning, though of course when the literal meaning is not applicable the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word gift is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift *mushaa* (undivided). There is no reason why the word *hibbah* should be held to mean an *ariat* (loan), and why, when it is clearly stated that the mauzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits [of the mauzas Kamalabad and Sahauli were given as *ariat*. On a perusal of the whole document it clearly appears that Faiz Ahmad Khan never even thought of effecting an *ariat*. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an *ariat*. The value of the property was fixed, the full stamp-duty was paid, and lest the property should be suspected to be *mushaa*, or undivided, and the gift vitiated on that account, he stated that both villages are owned by me without the partnership of any one else. Then, using the word '*hibbah*,' he declared that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion he expressed the nature of the document, by saying that he had written it by way of a deed of

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gift. He also stated in the document that he had made over the possession to the Musammat, which is the completion of the gift (but which is not necessary in an *ariat* or loan). He made the Musammat execute a document in the way of *kabuliat* (acceptance), which was necessary for the validity of the gift (not necessary in an *ariat*). After the conclusion of the words of the document and writing '*fakat*' (end), the words headed " P.S.—I promise," used by the defendant, further elucidated the nature of the gift, and show that it was a *hibbah-bil-ewas* (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as *ariat* (*commodatum*), about which there is no word at all in the whole document. The transaction cannot be considered to be an *ariat* unless all the words be construed in a sense other than literal: but for this there must be a very strong reason, which the Court thinks, does not exist.

The Subordinate Judge, after examining the words of the *ikrar-nama* given by the widow, concluded thus:—" Considering all these circumstances, the opinion of the Court is that both the villages were given to the Musammat as a gift, and not as an *ariat* (loan); that the document is clearly a *hibbah-nama* (deed of gift), and not an *ariat-nama* (a deed of loan); that both the villages were Wali-un-nissa's property by reason of the gift and heritable. According to the Muhammadan law, in an unconditional (*mahs*) gift, a donor is no longer competent to recede from the gift on the death of the donee, or, in other words to get the property back, and in *hibbah-bil-ewas* (gift for a consideration) the doctrine is clearer. Therefore, whatever be the description of this gift, the defendant is not entitled to get the estate back. The plaintiffs, who are the legal heirs of Wali-un-nissa, deceased, have a right according to the Muhammadan law to bring the claim."

This was upheld in the High Court which stated in its judgment:—

The Subordinate Judge, who enjoys a high reputation as a Muhammadan lawyer, has held that the language of these instruments proves an absolute gift. We do not venture to follow him

into the nice distinction of Arabic Grammarians. It appears to us reading the instruments together, that the words on which the appellant relies, "for the expenses of my sister-in-law," both declare the object of the gift and limit the interest created by the words of gift. These words standing alone would, it is admitted, confer an absolute estate on the lady, and we agree with the Subordinate Judge that, reading the one instrument with the other passage on which the appellant relies, they declare the object of the gift rather than restrict its operation. Wali-un-nissa, at the same time, caused her name to be expunged from the registers of Datauli Khas and Deosaini. That the parties so regarded the instrument of the 1st January, 1867, as conveying an absolute estate to her, appears from the circumstances that the lady's name was substituted for that of Faiz Ahmad Khan; that neither he nor his agents took any pains to have any right remaining in him recorded; that settlement was made with Wali-un-nissa, who is declared in the registers to be the sole owner, and in the record-of-rights as being competent to transfer the property, and where it is added that on the lady's death it would pass to her heirs. Seeing that the agents of the appellant did nothing to preserve his rights either when the lady's name was registered or when the records of-rights was prepared, it may well be inferred that they did not consider he had any rights left in him.

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Graham, Q. C., and J. T. Woodroffe for the appellant.

Leith, Q. C., and C. W. Arathoon for the respondents.

For the appellant it was urged that the widow acquired, upon the true construction of the documents, only the right to receive the rents and profits of the villages during her life, for her maintenance. She had not acquired the proprietary right. The intention of the parties had not, in the decisions under appeal, received effect; nor had the absence of words of inheritance, in the instrument of gift, been duly considered. On this point *Lekhraj Roy v. Kanhya Singh* (1) was cited. There was not a complete *hibbah-bil-ewaz*. Reference was made to Baillie's Digest of Muhammadan law, part I, Book VIII., Chap. I, p. 515, on gifts, and part I,

1881	Book VIII., Chap. III, on <i>kars</i> . The Hidaya (Grady, p. 478), vol. III, Book XXIX, on <i>ariat</i> or loan.
MUHAMMAD FAIZ AHMAD KHAN v. GHULAM AHMAD KHAN.	Council for the respondents were not called upon. Their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH.—This suit was brought by the two respondents, Hagi Ghulam Ahmad Khan and Haji Inayat-ullah Khan, claiming as heirs of their sister, Musammat Wali-un-nissa, to recover two villages, mauza Sahauli and mauza Kamalabad in zila Aligarh. The original defendant and appellant here was Faiz Ahmad Khan. He has died since the appeal to Her Majesty, and is now represented by his sons, who are his heirs. The question in the appeal turns upon the construction of two instruments. A third was executed to carry the transaction into effect; but the case really turns upon the construction of two instruments, one a deed of gift, and the other an agreement in which the gift is accepted.

In order to understand the position of the parties, who are Muhammadans, it will be necessary to refer to a few facts. Murad Khan, who was the talukdar of Datauli and the owner of several villages, having died, his grandsons, Muhammad Husain Khan and the defendant Faiz Ahmad Khan, succeeded to his estate; their father, Abdul Rahman Khan, having died in the grandfather's life-time. Abdul Rahman Khan left a widow, Musammat Wazir-un-nissa, the mother of his two sons, who is still living. Husain Khan, the elder grandson, died on the 31st of August, 1838, leaving as his widow, Musammat Wali-un-nissa, the sister of the two respondents, who now, as her heirs, claim the mauzas in question. On the death of Husain Khan his share in the estates which descended from his grandfather would fall, according to Muhammadan law, to his brother, Faiz Ahmad Khan, his mother, Wazir-un-nissa, and his widow, Wali-un-nissa, as co-sharers; the latter as widow, being entitled to a fourth. The estates had stood in the register in the name of Husain Khan, his brother Faiz Ahmad Khan being a minor; but after Husain's death they were placed in the names of his mother, his widow, and his brother, Faiz Ahmad Khan. Although the estates were so placed in the names

of the mother and widow, the two ladies did not enter into possession or receipt of the profits of them, but received allowances of money and grain. Wali-un-nissa, the widow, received annually 500 rupees and 100 maunds of grain. In 1856 the two ladies executed a power of attorney authorizing a mukhtar to expunge their names from the register; and in 1857 the power of attorney was acted upon, but partially only. Their names were expunged from the register with regard to the greater part of the estates, but two villages were left standing in their names, namely, Datauli Khas and Deosaini; and these villages remained in their names down to the time of the transaction which is in question. On attaining his majority Faiz Ahmad made a pilgrimage to Mecca. During his absence there appears to have been some dispute between the manager of the estate and the ladies or those acting for them, and some contest took place during the Government settlement which was then being prosecuted. It is not immaterial to refer to these proceedings, which show that, though the two ladies were receiving an allowance in money and grain, they had not given up their claim to a share of the estates. What took place is shortly stated in the judgment of the Subordinate Judge as follows:—"The revision of the settlement in this district commenced in 1863; and Wali-un-nissa, then, probably with the advice of Muhammad Inayat-ul-lah Khan (the cause of which, perhaps, might have been those very disputes), presented application through her agent for entry of her name in respect of the villages of the estate. But those applications were withdrawn about ten or twenty days after, on the 27th May, 1863 (as proved by the evidence of Farzand Ali, Mukhtar). The disputes were prolonged regarding Datauli Khas, in respect of which Wali-un-nissa's name had continued to be entered. The cause of this appears to have been that, in the *wajib-ul-ars*, Faiz Ahmad Khan had caused the name of Wali-un-nissa to be entered in regard to a $1\frac{1}{2}$ biswa share with receiving Rs. 500 cash and 100 maunds of corn. The Musammat applied for entry of her name in respect of a two-anna share, and also stated that the agents of Faiz Ahmad Khan had wrongly stated her right to $1\frac{1}{2}$ biswas, and her receipt of Rs. 500 cash and 100 maunds of corn." It thus appears that although an allowance in money and grain was made, Faiz Ahmad or his

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1881 agents admitted that the widow was entitled to 1½ biswas; and there is no satisfactory evidence to show that by taking the allowance she had relinquished her right to a share if she chose to insist upon it. These proceedings occurred in the absence of Faiz Ahmad at Mecca. After the discussion before the Deputy Collector the case was brought before the Collector, who very properly said that the Collectorate had nothing to do with the rights of the parties, and that the whole matter had better stand over until Faiz Ahmad returned. Faiz Ahmad returned from Mecca in the year 1866: and steps were then taken to come to an arrangement with his brother's widow, which was carried into effect by the documents which are now to be construed.

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The instrument executed by Faiz Ahmad Khan bears date the 1st of January, 1867. It states that he intended again to go to Mecca, and goes on thus:—"The karindas cannot properly meet the requirements of the services due to Bibi Wali-un-nissa, my sister-in-law (brother's wife); and whereas from before Rs. 500 cash and 100 maunds of grain were fixed on my part for necessary purposes, by way of rendering service to her, therefore I have now with great pleasure, willingly and voluntarily made a gift of mauza Sahauli, assessed at Rs. 1,310-5-1, and of mauza Kamalabad, assessed at Rs. 281-11-3, villages appertaining to pargana Atauli, in the zila of Aligarh, valued altogether at Rs. 10,000, and owned by me without the partnership of any other person, for all the expenses of the said sister-in-law, and put her in possession." If it had stopped here, there could be little doubt that the instrument would contain an absolute gift of the two mauzas. It goes on:—"I do declare and record that the aforesaid sister-in-law may manage the said villages for herself, and apply their income to meet her necessary expenses and to pay Government revenue." Those words, it is contended, cut down the previous words of gift, not even to a gift for life, but to what in Muhammadan law is called an *ariat* or loan, which would seem to be no more than a license to take the profits of the land, revocable by the donor. Undoubtedly, those words require consideration. They may have been inserted either to show that an *ariat* was intended, or merely to show the motive and consideration of the gift. In order to ascertain which of

those two meanings the words properly bear, the rest of the document is material to be considered. It goes on:—"And that I and my heirs shall make no objection or opposition." These words seem to be entirely opposed to the view that an *ariat* in the sense of a resumable loan or license was intended. It goes on: "I therefore have written these few words as a deed of gift,"—the grantor here distinctly describes the deed or instrument he is signing as a deed or instrument of gift,—“that it may serve as evidence.” Then, written by way of postscript, he says:—"I declare that these villages have been given in lieu of the former Rs. 500 cash and 100 maunds of grain, and that henceforth the said money and the grain shall not be given." This, taken in its plain sense, is a statement of one of the considerations for the gift; and it was necessary to be stated, otherwise a claim might have been made for a continuance of the allowance of the rupees and grain in addition to the benefit which the donee took under the deed.

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The Musammat executed an *ikrar-nama*, dated on the 3rd January 1867, but which was, in fact, executed on the same day as the deed of gift; and the two instruments evidently form but one transaction. It contains a recital of her having received the money and grain, and of some of the facts relating to the register and to her name having been upon it and expunged; and then it proceeds thus:—"Muhammad Faiz Ahmad Khan has now returned from Arabia, but notwithstanding that I had caused my name to be expunged he gave me mauzas Sahauli and Kamalabad, in taluka Datauli, for my maintenance and support, I am now satisfied and contented with this property." The word "property" surely implies that she had the estates. The mere right to take the usufruct so long as the grantor pleased could hardly be described as property, nor would it be a provision with which she was likely to be satisfied and contented. Then there is this important relinquishment of claim on the part of the Musammat: "I do declare that neither I have nor shall have any claim in future respecting the estate of Datauli Khas, the villages of the taluka Datauli, Burhansi, Deosaini, the villages in taluka Malakpur and Rahwara, and other detached villages, and also respecting the moveable and

1881 immoveable property constituting the ancestral estate of Muhammad
 MUHAMMAD Faiz Ahmad Khan"; that is, she disclaims and relinquishes all
 FAIZ AHMAD her right as a co-sharer to the whole of the ancestral estate; and
 KHAN it is plain that not only had her name remained up to this time
 v. on the register in respect of the two villages, Datauli and Deo-
 GHULAM saini, but that she had done nothing which would have amounted
 AHMAD to a release of her right as co-sharer in the ancestral property. It
 KHAN. is evident that Faiz Ahmad, in obtaining from the widow this
 release of her right, considered that he was getting something
 valuable; and undoubtedly she was giving up a valuable right
 for that which, according to the appellant's present contention,
 would not be a fair or reasonable equivalent for it.

The question upon these instruments, as already stated, is whether, read together, as their Lordships think they must be, they constitute a gift by Faiz Ahmad Khan to Wali-un-nissa, or amount only to an *ariat* or loan. The allegation in the appellant's pleading below is that the latter is the true construction. Upon this question their Lordships have the benefit of an able and learned judgment from a Muhammadan Judge of whom the High Court says that he enjoys a high reputation as a Muhammadan lawyer. This learned Judge has referred to many books of authority on Muhammadan law, from which he has given extracts and also instances in his judgment. He is clearly of opinion that this instrument contains words which in Muhammadan law have a technical signification as words of gift, and which, when used as they are in it, do by law constitute a gift. He also thinks that the words "that she might maintain herself out of the estates" describe one of the objects of the gift, and do not limit or cut down its operation.

Their lordships do not think it necessary to discuss the authorities cited, but there are two short passages in the judgment of the learned Subordinate Judge that may be usefully referred to. He says:—"There is no reason why the word *hibbah* should be held to mean an *ariat* (loan), and why, when it is clearly stated that the mauzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mauzas Kamalabad and Sahauli were given as *ariat*." It may be

observed that, if it had been meant to give the profits only, the deed might have been so expressed, but the mauzas themselves are given. Then he concludes his judgment in this way:—"Considering all these circumstances, the opinion of the Court is that both the villages were given to the Musammat as a gift, and not as an *ariat* (loan); that the document is clearly a *hibbah-nama* (deed of gift) and not an *ariat-nama* (a deed of loan); that both the villages were Musammat Wali-un-nissa's property by reason of the gift, and heritable. According to the Muhammadan law, in an unconditional (*mahz*) gift a donor is no longer competent to recede from the gift on death of the donee, or, in other words, to get the property back, and in *hibbah-bil-ewaz* (gift for a consideration) the doctrine is clearer." The gift in this case appears to their Lordships to be a *hibbah-bil-ewaz*.

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Some difficulty was felt by the learned counsel for the appellant in condescending upon the definition of an *ariat*. It was pointed out to them that in the written statement of the appellant the contention was this:—This mode of giving, where the word acceptance (*ejab*) denotes the proprietorship of the profits and not the proprietorship of the area, is called *ariat* (*commodatum*) in the Muhammadan law; that is to say, the proprietary right of the person who gives is not extinguished; and he can resume (the estate) at any time. It is therefore not valid, according to the Muhammadan law, to claim by inheritance to the said Musammat an estate which she herself did not own." This statement is in accordance with what is said of *ariat* in the *Hidaya*, Book 29. The learned counsel Mr. Graham at first adopted this statement; but feeling how difficult it was to support the instrument as an *ariat* having this effect, both the learned counsel for the appellant afterwards endeavoured to construe it as being something intermediate between an absolute gift and an *ariat*. This was obviously a departure from the view originally taken by those who advised the appellant in the Court below, and no authority in Muhammadan law for holding that any such construction could be given to the document has been shown. Their Lordships are satisfied, as the High Court below was satisfied, that the Muhammadan Judge has come to a correct conclusion that the transaction was a

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gift for a consideration, and that the words relied on to cut it down to an *ariat* have not that effect. It is to be observed that the Subordinate Judge cites various instances from books on Muhammadan law in which very similar words, used after words of absolute gift, have been read as being descriptive of the motive or consideration of the gift, and ineffectual to control the operation of technical words of gift.

For these reasons their Lordships think that the judgments below are right; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

Solicitor for the respondents: Mr. *T. L. Wilson*.

CIVIL JURISDICTION.

1881
 January 31.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KALLU MAL (DEFENDANT) v. BROWN (PLAINTIFF).*

Attachment of Property—Suit to establish Right—Suit for compensation for Wrongful attachment—Act X of 1877 (Civil Procedure Code), ss. 279, 283.

An order striking off an objection to the attachment of property attached in execution of a decree for default of prosecution is not "conclusive" as regards the right which the objector claimed to the property, within the meaning of s. 283 of Act X of 1877.

Held, therefore, where a person objected to the attachment of certain moveable property attached in execution of a decree, claiming it as his own, and his objection was struck off for default of prosecution, that such person might sue for damages for the wrongful attachment of such property without suing to establish the right which he claimed thereto.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. One Kallu Mal had been sued in the Court of Small Causes at Allahabad by one Brown for compensation for the wrongful attachment in the execution of his decree against one Joakim of a carriage belonging to Brown. It appeared in that suit that, when such carriage had been attached, the plaintiff objected under s. 278 of Act X of 1877 to the attachment, claiming such carriage as his own property.

* Application, No. 91B. of 1880, for revision under s. 622 of Act X of 1877 of an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 11th September 1880.

He failed to appear on the day fixed for the hearing of the objection, and the objection was struck off for default of prosecution. The carriage was subsequently sold. The defendant set up as a defence to the suit that the plaintiff was bound under s. 283 of Act X of 1877 to bring a suit to establish his right to the carriage, and was not at liberty to sue for compensation for its wrongful attachment until he had done so, as his right was concluded by the determination of the objection. The Judge of the Court of Small Causes disallowed this defence, holding that s. 283 only applied when orders had been passed by the Court after investigation under ss. 280, 281, and 282 of Act X of 1877, and no such order had been passed on the plaintiff's objection, which had been simply struck off for default of prosecution. The defendant applied to the High Court to revise the proceedings of the Judge of the Small Cause Court, under s. 622 of Act X of 1877, on the ground that the plaintiff was bound under s. 283 to sue for the establishment of his right before he could sue for damages.

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Munshi Kashi Prasad for the defendant.

Mr. Hill for the plaintiff.

The following judgment was delivered by the Court (SPANKIE, J., and OLDFIELD, J.)—

OLDFIELD, J.—We are of opinion that the view taken by the Judge of the Small Cause Court is correct, and we dismiss this application with costs.

Application rejected.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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RAM BARAN RAI (PLAINTIFF) v. MURLI PANDEY AND ANOTHER
(DEFENDANTS).*

January 17.

Registered and unregistered documents—Act XVI of 1864—Act III of 1877 (Registration Act), s. 50.

An unregistered document, executed before Act XVI of 1864 came into force, is not invalidated or postponed to a document registered under Act IX of 1871, under the *Explanation* given in s. 50 of Act III of 1877.

* Second Appeal, No. 1223 of 1879, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 12th August 1879, reversing a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 19th April 1879.

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THE plaintiff in this suit claimed, *inter alia*, a declaration that he was the mortgagee of certain land by invalidation of a mortgage of such land to the defendants. The plaintiff claimed to be the mortgagee of the land under two deeds dated the 12th February 1875 and the 24th October 1876, respectively. The defendants claimed to be the prior mortgagees of the land under a deed dated the 24th November 1864, the consideration for the mortgage being under Rs. 100. The plaintiff's deeds of mortgage were registered. The deed of the defendants was not registered. On second appeal to the High Court by the plaintiff it was contended on his behalf that the deed of the defendants being unregistered should be postponed to his registered deed.

Munshi *Hanuman Prasad* for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) for the respondents.

The judgment of the Court (STUART, C.J., and PEARSON, J.) so far as it related to the contention set out above, was as follows:—

PEARSON, J.—The defendants' unregistered deed, having been executed before Act XVI of 1864 came into force, is not invalidated or postponed to the deeds recently executed in the plaintiff's favour and registered, under the *Explanation* given in s. 50, Act III of 1877.

Before Mr. Justice Spinkie and Mr. Justice Oldfield.

1881
 January 31. PAKHANDU (PETITIONER) v. MANKI AND OTHERS (OPPOSITE PARTIES).*

Custody of minor—Minor wife—Act IX of 1861.

P, whose minor wife had refused to return to cohabitation with him on the ground that he was out of caste in consequence of having committed a criminal offence, applied to the District Court under Act IX of 1861 for the custody of her person. *Held* that that Act did not apply to such a case (1).

PAKHANDU on the 30th June 1880, preferred a petition to the District Judge of Benares, under Act IX of 1861, for the custody of his wife Manki aged sixteen years. He stated in this petition, amongst other things, that he had been married to Manki during

* First Appeal, No. 150 of 1880, from an order of M. Brodhurst, Esq., Judge of Benares, dated the 19th August 1880.

(1) See also *Balmakund v. Janki*, *ante* p. 403.

her father's lifetime; that she had cohabited with him after the marriage; that her father had died, and some eight months ago her mother had taken her home; that he had applied to her mother to allow her to return to him, but her mother refused to allow her to do so, and her mother and sister and sister's husband prevented her from returning; that he, being her husband, was entitled to the custody of her person, and the interference of her relations was improper; and that under Act IX of 1861 he was entitled to recover possession of her person. Manki's mother opposed this application on the ground that the applicant was out of caste, and so long as he was so his wife could not return to him without losing caste herself; and that "a claim for restitution of conjugal rights could not be decided in a miscellaneous proceeding." Manki was examined and deposed that the applicant was her husband; that she had lived with him about four years; that he had been accused about a year ago of committing an unnatural offence; that for that reason her caste people were on bad terms with him; and that for the same reason she would not consent to return to cohabitation with him. The District Judge, having regard to the facts that the applicant's wife and her mother and other relations appeared to believe that the applicant had committed the offence of which he was accused, that if Manki returned to her husband she and her relations would be excommunicated by many of the brotherhood, and that there was some reason to believe that the accusation against the applicant was not "totally devoid of foundation," was of opinion that Manki ought not to be made over to the custody of the applicant against her will; and rejected the application. The applicant appealed to the High Court.

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The Senior Government Pleader (Lala Juala Prasad) for the appellant.

Mr. Dillon for the respondents.

The judgment of the Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

SPANKIE, J.—The application is really one for the purpose of recovering possession of a wife whose age is sixteen years, who has formerly lived with her husband, but refuses to do so on the ground

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that he is out of caste in consequence of having committed a serious criminal offence, and that if she resided with him she would lose her own caste. We do not think that Act IX of 1861 can be regarded as applying to such a case. The Act applies to any relatives or friends of the minor who may claim in respect of the custody or guardianship of such minor. The husband, if he could be held to be a relative within the meaning of the Act, does not claim possession of the girl as a minor but as his wife, who is sixteen years of age, and has lived with him as a wife in former years. Therefore the Judge's order rejecting the application though made upon different grounds, is correct.

Application rejected.

CIVIL JURISDICTION.

1881
February 1.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

IN THE MATTER OF THE PETITION OF MADHO PRASAD.

Sanction for prosecution—Act X of 1872 (Criminal Procedure Code), ss. 468, 469—High Court's powers of revision—Act X of 1877 (Civil Procedure Code), s. 622.

The discretionary power of a Civil Court, before or against which an offence mentioned in ss. 468 or 469 of Act of 1877 is alleged to have been committed to grant or withhold sanction to the prosecution for such offence, is not subject to revision by the High Court under s. 622 of Act X of 1877.

THIS was an application to the High Court for the revision under s. 622 of Act X of 1877 of an order of Lieutenant-Colonel F. Wheeler, Judge of the Cantonment Court of Small Causes at Cawnpore, dated the 24th December 1880. It appeared that the applicant, one of the plaintiffs in a suit which had been instituted in the Cantonment Court of Small Causes at Cawnpore, had, on the 23rd December 1880, applied to the Judge of that Court for sanction to prosecute the defendant in that suit for fabricating false evidence. On the same day the Judge made an order granting the required sanction. On the following day, the 24th December, the Judge, stating that such sanction had been granted by mistake, and that there was nothing to show that the defendant had fabricated false evidence, made an order setting aside his previous order granting such sanction.

The grounds on which revision of the order of the 24th December was sought were (i) that the Judge of the Small Cause Court

was not competent to revoke his previous order of the 23rd December; and (ii) that the reasons given for the second order failed to support it.

Mr. *Colvin* for the petitioner.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—This is an application to the Court to revise under s. 622, Civil Procedure Code, an order of the Judge of the Small Cause Court of Cawnpore, cancelling a previous order which he had made granting his sanction to the applicant to institute a complaint of an offence under s. 194, Indian Penal Code, alleged to have been committed in the course of a suit decided in his Court. It is contended that it was illegal to cancel the order giving sanction. We are of opinion that this is not a case to which the provisions of s. 622 are intended to apply. The cases referred to in that section are those where “the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.” The section contemplates the revision of an error committed in the course of deciding a case. The provisions of this section would not appear to be applicable to a matter relating to the exercise of the discretionary power of a Court in the granting or withholding sanction to a criminal prosecution. Moreover, considering the Judge of the Small Cause Court had a discretion as to the grant of sanction, and that it is still within the power of the applicant to apply for sanction to the superior Court, we should be indisposed to interfere by way of revision. The application is dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

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February 2.

IMDAD HUSAIN (DEFENDANT) *v.* MANNU LAL AND ANOTHER
(PLAINTIFF).*

Conditional sale—Foreclosure of mortgage—Regulation XVII of 1806, s. 8.
An instrument of conditional sale provided that the conditional vendor

* Second Appeal, No. 851 of 1880, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 4th May 1880, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 24th December 1879.

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should retain possession of the property to which it related, paying interest on the principal sum lent annually at twelve per cent., and should repay the principal sum lent within seven years, that (by the fourth clause thereof), in the event of default of payment of interest in any year, the term of seven years should be cancelled, and the conditional sale should at once become absolute; and that (by the fifth clause thereof), in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held* that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of s. 8 of Regulation XVII of 1806 and was compatible with them; and on or after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed; and that accordingly such suit was not maintainable.

THE plaintiffs in this suit claimed an 8-anna share of a certain village, by virtue of a deed of conditional sale bearing date the 14th May 1874, and a foreclosure proceeding dated the 13th July 1878. By this deed the defendant mortgaged such share to the plaintiffs for Rs. 2,000 for a term of seven years, the deed containing the following stipulations:—“(iii). That the mortgagor should retain possession of the property, paying interest at one per cent. per mensem, and should repay Rs. 2,000, the principal sum, within seven years, and then get the property redeemed, and this deed returned: (iv) that, if in any year he (mortgagor) failed to pay the interest, then the principal sum and the remaining interest should become the sale-consideration, and the term fixed should be cancelled, and this mortgage-deed should be deemed a sale-deed: (v) that if he (mortgagor) failed to repay the principal sum within seven years, then after the expiry of that term this deed should become an absolute sale-deed, and the mortgagee-consideration the sale-consideration, to which he or his heirs should not have any claim.” On the 23rd April 1877, the term of the mortgage not having expired, the plaintiffs applied for foreclosure on the ground that since the date of the execution of the deed of conditional sale the defendant

had not paid any interest. Notice of foreclosure was served on the defendant on the 13th May 1877, and on the 13th July 1878, the year of grace having expired, the mortgage was declared foreclosed. The defendant set up as a defence to the suit that the plaintiffs were not entitled to apply for foreclosure under Regulation XVII of 1806, by reason that he had failed to pay interest as stipulated in the deed of conditional sale, and the foreclosure proceedings were consequently invalid, and the suit was not maintainable. The Court of first instance allowed this contention, its reasons for so doing being as follows:—"S. 8 of Regulation XVII of 1806 prescribes a certain course of procedure for a mortgagee, if he is desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period: in the mortgage-deed in suit the stipulated period for the discharge of the principal of the mortgage loan is seven years from the 14th May 1874, the date of the deed: it also stipulates that the conditional sale should become absolute, if within the said period the defendant failed to pay interest on the loan in any year: the question is, whether the plaintiffs were justified by law in applying for foreclosure when the defendant failed to pay interest for nearly the first three years after the execution of the said mortgage-deed, or should have waited for the whole of the said stipulated period of seven years before having recourse to taking any step for foreclosing the mortgage: the words 'stipulated period' used in the said s. 8 are interpreted in the decision of the Calcutta High Court in the case of *Srimati Sarasibala Debi v. Nand Lal Sen* (1) 'to be the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor to be entitled to a reconveyance:' this interpretation, which is further amplified in the said decision, allowed, in my opinion, no right to the plaintiffs in the present case to foreclose the mortgage at any time before the expiry of the said period of seven years from the 14th May 1874, the date of the mortgage-deed in suit: consequently the foreclosure proceedings they took in 1877, in the Judge's Court, are bad in law, and have not the effect of rendering the conditional sale connected with the deed in suit absolute: they are therefore not entitled to have proprietary possession of the

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(1) 5 B. L. R., 389.

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share in dispute: this finding renders it needless for me to go into the other issues: the plaintiff's suit is accordingly dismissed." On appeal by the plaintiffs the lower appellate Court reversed the decision of the first Court and gave the plaintiffs a decree, its reasons for so doing being as follows:—"In appeal it is urged the precedent relied upon by the lower Court is inapplicable for the reason that the mortgage-deed referred to therein did not recite a separate contract in respect of the interest, that is to say, it did not set forth that the stipulated period of payment of the principal should be altered on default of payment of the interest, but the first penalty should be the charge of compound interest, and after that the mortgagee should be at liberty to make the sale absolute, whereas in the present case there is a stipulated period for the principal and another for the interest, and on default being made the stipulated period becomes cancelled by the express terms of the covenant, and another period commences during which the mortgagors become liable to the call for payment and the mortgagees hold the right to foreclose: in the Calcutta case—*Srimati Sarasibala Debi v Nand Lal Sen* (1)—the mortgage-deed, although written in the English form, was held to fall within the operation of Regulation XVII of 1806, and the suit having been instituted before expiry of the period stipulated for repayment of the principal sum, it was pronounced to be premature: that case alike with the present one was brought on account of the mortgagors making default in payment of interest, and the discussion extended to the proper meaning to be attached to the words 'stipulated period' referred to in Regulation XVII of 1806; they were held to mean 'the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor is to be entitled to a reconveyance'; that is to say, it embraces the period of grace allowed for taking out foreclosure proceedings by mortgagees: the question did not turn on the effect of default in payment of interest: in the present instance there is a separate liability involved in the due observance of the contract as regards payment of interest, and the penalty in default thereof is equally binding and equally severe as upon the non-payment of the principal within their respective stipulated periods, with this difference, that the

(1) 5 B. L. R., 389.

stipulated period for the principal is seven years, and for the interest the period is each recurring year of those seven years separately: if the conditions of the contract are to be adhered to, then the remedy must be held to be due to the mortgagees (plaintiffs) the moment there is a default in the payment of interest, and upon their coming forward to see it enforced they appear to me to be at liberty either to call upon the mortgagor, either to exercise the equity of redemption, or themselves to demand foreclosure in the terms of the contract: this would seem to be the opinion of the Calcutta Court in *Prosaddoss Dutt v. Ramdhone Mullick* (1), where it was held, *inter alia*, 'that the assignee of a mortgagee had a right to foreclose on default of payment of an instalment of interest before the date on which the principal was made payable': again in the Full Bench ruling in *Buldeen v. Gulab Koomer* (2), the principles then enunciated favour this view, for it was then held: 'On the construction of the mortgage-deed the mortgagee was not limited thereby to foreclosure as soon as the first default in payment of instalments occurred and not afterwards, but that the mortgagee was authorized in proceeding to foreclose if there were subsequent default, any previous default notwithstanding, in fact there is nothing in law to limit the time within which a mortgagee may foreclose, if notwithstanding one or more defaults the mortgagee's right is not repudiated but recognized': the right is fully recognized in this suit on the disposal of the technical point: were a contrary view to the above maintained, there would be no advantage in contracting a penalty in default of payment of interest, the terms of the covenant *quoad* the interest would have to remain a dead-letter, and as it is to the conditions of a contract we have to look, there is nothing repugnant to the claim to foreclose in the deed before us and the right of suit exists: the appeal is accordingly decreed in the terms of the plaint, which relates to proprietary rights only, with costs, in reversal of the lower Court's order." The defendant appealed to the High Court.

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Messrs. *Chatterji* and *Amir-ud-din* for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Lala Lakta Prasad* for the respondents.

- (1) 1 *Indian Jurist* (1886), 255. (2) N.-W. P. H. C. Rep., F. B., 1886-67, p. 102.

1881 The Court (PEARSON, J., and SPANKIE J.) delivered the following

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MANNU LAL. JUDGMENT.—The fifth clause of the deed in question which declared that, in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale shall become absolute, does not dispense with the necessity of complying with the provisions of s. 8, Regulation XVII of 1806, and is compatible with them. On or after the expiry of the stipulated period, application for the foreclosure of the mortgage and rendering the sale absolute in the manner prescribed by the Regulation may and must be made. But the fourth clause, which declares that, in the event of default of payment of interest in any year, the term of seven years shall be cancelled and the conditional sale shall at once become absolute, without substituting any new term for the repayment of the principal sum lent, on or after the expiration of which proceedings of the nature contemplated in s. 8, Regulation XVII of 1806, may be taken, does in effect defeat and violate the provisions of that law, and summarily convert a conditional into an absolute sale in disregard and defiance thereof. The foreclosure proceedings taken by the plaintiff in this case before the expiration of a period stipulated for the repayment of the principal sum lent were irregular; and it would seem that the sale can only be rendered conclusive in the manner prescribed by the Regulation in pursuance of the fifth clause of the deed. Accordingly we decree the appeal with costs, reverse the lower appellate Court's decree, and restore that of the Court of first instance.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Spankie.

1881 AHMAD ALI (PLAINTIFF) v. HAFIZA BIBI AND ANOTHER (DEFENDANTS).
February 8. *Bond payable by instalments—Limitation—Waiver.*

On the 24th May 1866, *H* gave *A* a bond payable by instalments which provided that, if default were made in the payment of one instalment, the whole should be due. The first default was made on the 28th June 1866. No payment was made after Act IX of 1871, sch. ii, No. 75, came into force. *Held*, in a suit

* Second Appeal, No. 865 of 1880, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 28th May 1880, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 22nd April 1880.

upon such bond, that limitation began to run when the first default was made, and no waiver before Act IX of 1871 came into force could affect it.

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AHMAD ALI
v.
HAFIZA BIBI.

THE plaintiff in this suit claimed Rs. 2,629-13-3, the balance of the principal amount, and Rs. 795-2-0 interest, due on a registered bond dated the 24th May 1866, which had passed into his hands by assignment. He claimed to recover such moneys from the defendants personally and from the immoveable property hypothecated in the bond. This bond, the plaintiff alleged, had been executed by the defendant Husain Bakhsh for himself and on behalf of the defendant Hafiza Bibi. It provided that the principal amount, Rs. 4,500, with interest at twelve per cent. per annum, should be payable in fourteen annual instalments. The instalments were payable in the month of Jaith. The first instalment, payable on the 28th June 1866, was Rs. 50 and the interest due on the whole amount. The following ten instalments were Rs. 300 each and the interest due on the balance. The next two were Rs. 500 each and the interest due on the balance. The last was Rs. 450 and the interest on that sum. The bond also provided that, in the event of default in payment of any one instalment, the obligee "should be at liberty, without waiting for the instalment term mentioned in the bond to expire, to realize from the obligors the whole of his money, principal with interest, and costs, in a lump sum, by avoiding the instalment arrangement, in any manner he pleased." No payment was made on the 28th June 1866, or in that year; but from the account-books of the original obligee of the bond, one Manik Chand, it appeared that a payment of Rs. 329 on account of interest was made on the 1st January 1867. It also appeared from the same account-books that after that date instalments were for some years duly paid, the last payment entered being one for Rs. 692 (Rs. 300 principal, Rs. 392 interest) made on the 2nd June 1871. Besides these payments there were two other payments recorded by the plaintiff on the back of the bond. One purported to be for Rs. 1,150 on account of interest made on the 17th May 1877, and the other for Rs. 1,184 on the same account made on the 27th September 1877. The plaintiff alleging that his cause of action arose on the 22nd June 1872, when default had been made in payment of the instalment payable on that date, relied on the alleged payments of interest on the 17th May

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1877, and on the 27th September 1877, as giving him a fresh period of limitation. The suit was instituted on the 12th March 1880. The defendant Hafiza Bibi contended that the suit was barred by limitation. The lower Courts held that this was so, the lower appellate Court holding that, having regard to the terms of the bond, limitation ran from the date of the first default, and that, assuming that the payment which appeared from the books of Manik Chand to have been made on the 2nd June 1871, had been made in good faith on behalf of the defendants, such payment did not give the plaintiff a fresh period of limitation, as such period had expired at the time such payment was made, and that it was not proved that the payments recorded on the bond had been made.

On second appeal by the plaintiff to the High Court it was contended on his behalf, *inter alia*, that the suit was within time.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad* for the appellant.

Babu *Oprokash Chandar Mukarji* for the respondents.

The judgment of the Court (PEARSON, J., and SPANKIE, J.) was delivered by

SPANKIE, J.—We must accept the finding of the Judge, which is one of fact, that the two payments of interest said to have been made in May and September 1877 were not so made. The lower appellate Court has also found that it was not sufficiently proved that the payment of Rs. 692 as principal and interest on the 2nd June 1871, was a *bond fide* payment on account of the debtors, made by or on behalf of Husain Bakhsh. But even if it were otherwise the Judge is right in finding that the suit for the money as claimed is barred by the lapse of more than six years from the alleged payment on the 2nd June 1871. By the terms of the bond the whole sum was recoverable at once on the failure of one instalment, and more than twelve years have expired from this date. Therefore the suit would appear to be barred. The bond was executed in 1866, and in holding the claim to be barred we should follow the decisions of this Court and of the Courts of the other Presidencies in dealing with similar cases. The Bombay case —*Ramkrishna Mahadev v. Bayaji bin Santaji* (1),—cited by appel-

(1) 5 Bom. H. C. Rep., A. C. J., 35.

lant's pleader was not followed in a later decision of that Court, —*Gumna Dambarahet v. Bhiku Hariba* (1); and the ruling of this Court in *Madho Singh v. Thakur Pershad* (2) was followed by this Court on several occasions—S.A. No. 461 of 1879, decided the 23rd August, 1879 (3). It was pressed upon us that a decision of the Judicial Committee—*Janeswar Dass v. Mahabeer Singh* (4)—took a different view. But the circumstances of that case were peculiar, as the suit against the defendants Nos. 2 and 3 had for its object a sale of the land hypothecated in a bond of which they had become purchasers under a subsequent mortgage-bond. It was therefore as against them a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. The ruling in this case does not affect the decision of this Court referred to above, that part-payment of a debt contracted when Act XIV of 1859 was in force, after default, does not affect the limitation. The last instalment was paid, if paid at all *bonâ fide*, on the 2nd June, 1871, and twelve years have passed since the first default occurred on the 28th June, 1866. The term of twelve years expired on the 28th June, 1878. No waiver could affect the limitation law until art. 75, sch. ii, was published in Act IX of 1871, which came into force on the 1st July, 1871, and nothing has been paid since 2nd June, 1871. The suit was brought on the 12th March, 1878. The intermediate alleged payment of interest has not been proved; so clearly more than six years have passed since the 2nd June, 1871, and neither Act IX of 1871 nor Act XV of 1877 could help the plaintiff's case. We dismiss the appeal and affirm the decree with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAM ANUJ SEWAK SINGH (OBJECTOR) v. HINGU LAL (DECREE-HOLDER).*

1881
February 10.

Application for Execution of Decree—Legal representatives of deceased judgment-debtor—Act XV of 1877 (Limitation Act), sch. ii, No. 179.

An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor, takes effect, for the purposes of limitation, against them all.

* First Appeal, No. 154 of 1880, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 12th July, 1880.

(1) I. L. R., 1 Bom. 125.

(2) N.-W. P. H. C. Rep. 1873, p. 35.

(3) Unreported.

(4) I. L. R., 1 Calc., 163.

1881 THE facts of this case are sufficiently stated for the purposes of
 this report in the judgment of the High Court.

RAM ANUJ
 SEWAK
 SINGH
 v.
 HINGU LAL. Mr. *Spankie* and Munshi *Kashi Prasad* for the appellant.

 The Senior Government Pleader (*Lala Juala Prasad*) for the
 respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.)
 was delivered by

OLDFIELD, J.—In this case the decree-holder obtained a decree against a sole judgment-debtor. Application for execution of the decree was made against the judgment-debtor within time, and on his death execution was taken out against two representatives of the deceased, his son Rai Nar Singh, and his widow Ab-lakhi Kuar, also within time, the last application being made on the 5th April, 1880. On the 17th May the decree-holder petitioned the Court executing the decree that his application of the 5th April, 1880 might be amended by adding the name of Ram Anuj Sewak Singh, the minor grandson of deceased, under the guardianship of Rai Nar Singh, and execution should proceed against him, the decree-holder having now obtained information that he was one of the heirs of the deceased judgment-debtor and in possession of the property. The Court ordered that the petition be filed and notice should issue to the said Ram Anuj Sewak Singh. The latter objected that the execution of the decree was barred by limitation against him, and the Court disallowing the objection this appeal has been instituted. The application which is the subject of this appeal has been made within time from the date of the last application against the son and widow of the deceased, but it is contended that the application to execute the decree against the other representatives of the deceased is not an application within the meaning of cl. 4, art. 179, Limitation Act, so as to give a period from which limitation will run. We have to determine the question entirely with reference to the provisions of cl. 4, art. 179. What the law requires is that within the period allowed there shall have been an application "in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order." It cannot be said that the application against

the representatives of the judgment-debtor does not meet the above requirements of the law. The omission to ask for execution in it against the appellant as one of the representatives of the judgment-debtor does not affect its legality. The appellant can only succeed in his contention, if it can be held that the application for execution made against one legal representative of a sole judgment-debtor, although it may meet the requirements of the law, shall not take effect for the purpose of saving limitation against another representative of the judgment-debtor who is only liable for the property in his possession. But the law makes no such provision, and its omission to do so is significant, for Explanation I to art. 179 provides that "where the decree has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against." Had it been intended that the legal representatives of a sole judgment-debtor or of jointly liable judgment-debtors should have the benefit of a similar provision on the analogous grounds that they are only liable to the extent of the property in their possession, it is reasonable to suppose that the Legislature would have extended the provision to them. The position, however, of several representatives of a sole judgment-debtor is very different *quoad* the decree-holder from that of several judgment-debtors with separate liabilities found by the decree. We dismiss the appeal with costs.

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RAM ANUJ
SEWAK
SINGH
v.
HINGU LAL.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Straight.

KANAHI LAL AND OTHERS (DEFENDANTS) *v.* NAUBATRAI (PLAINTIFF).*

1881

Dismissal of appeal on the merits in the absence of appellant—Act X of 1877 (Civil Procedure Code), ss. 556, 558—Second appeal.

February 10.

An appellate Court, the appellant not attending in person or by his pleader, instead of dismissing the appeal for default, as provided by s. 556 of Act X of 1877, proceeded, in contravention of the provisions of that law, to dispose of the appeal on the merits, and dismissed it. The appellant preferred a second appeal to the High Court, contending that the appellate Court had acted contrary to law. *Held* that the appellate Court had so acted, and its

* Second Appeal, No. 878 of 1880, from a decree of W. Young, Esq., Judge of Bareilly, dated the 11th May 1880, affirming a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 28th February, 1880.

1881 decision could only be treated as a dismissal for default, and that, so treating it, the proper and only course open to the appellant was to have applied under s. 558 for the readmission of his appeal, and under these circumstances the second appeal would not lie. *Nand Ram v. Muhammad Baksh* (1) followed.

KANAI LAL
v.
NAUBAT RAI.

THE defendants in this case appealed from the decree of the Court of first instance. When the appeal was called on for hearing the pleader for the defendants was not present. The lower appellate Court proceeded to consider the appeal in the absence of the pleader for the defendants; and, "after perusing the proceedings of the lower Court and the grounds of appeal, and after hearing counsel for the respondent," came to the opinion that the decree of the Court of first instance was right and should be affirmed; and dismissed the appeal.

The defendants appealed to the High Court, contending that the lower appellate Court had acted contrary to law in deciding the appeal preferred to it on the merits in the absence of the pleader for the appellants.

Mr. C. Dillon and Munshi Hanuman Prasad for the appellants.

Mr. Conlan and Pandit Ajudhia Nath for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The first plea urged in appeal has force and must prevail. It was not competent for the Judge to act directly in contravention of the provisions of s. 556 of the Civil Procedure Code, by proceeding to dispose of the appeal upon the merits in the absence of the appellant and his pleader. To such extent, therefore, as he did so, he acted "*ultra vires*," and his decision can only be treated as a "dismissal" for default. But the appellant scarcely seems to have apprehended that the practical result of the objection he urges must be that no second appeal will lie. For the Judge, being taken to have dealt with the appeal under s. 556, the proper and only course open to the appellant was to have applied under s. 558 for readmission of his appeal, and had his application been refused the order rejecting it would have been

(1) I. L. R., 2 All., 616.

appealable under s. 588.—*Nand Ram v. Muhammad Baksh* (1), 1881
 Under these circumstances it is obvious that the present special KANABI LAL
 appeal to this Court will not lie, and it must therefore be dismissed v.
 with costs. NAUBAT RAI.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

1881
February 11.

SUKHDAIK MISR AND OTHERS (PLAINTIFFS) v. KARIM CHAUDHRI
 AND ANOTHER (DEFENDANTS).*

*Determination of title by Revenue Court—Res judicata—Act XVIII of 1873
 (N.-W. P. Rent Act), ss. 36, 39—Act X of 1877 (Civil Procedure Code)
 s. 13—Jurisdiction of Civil Court.*

S caused a notice of ejectment to be served upon K in respect of certain land, alleging that he held the same by virtue of a lease which had expired. K contested his liability to be ejected under s. 39, denying that he held the land by virtue of such lease alleging that he held it under a right of occupancy. The Revenue Court decided that K held the land under a right of occupancy and not under such lease. S thereupon sued K in the Civil Court, claiming possession of such land, on the allegation that K was a trespasser wrongfully retaining possession thereof after the expiration of his lease. Held that the suit was cognizable in the Civil Courts, and the decision of the Revenue Court did not render the matter in issue *res judicata*. The provisions of s. 13 of Act X of 1877 do not apply to applications such as those under s. 39 of Act XVIII of 1873.

THE plaintiffs in this suit claimed possession of certain land. They alleged that the defendant acquired such land under a lease of a two-anna eight pie share of the village in which such land was situate, and that as such lease had expired the defendant was holding such land as a trespasser. The defendant set up as a defence to the suit that he had not acquired such land under the lease, but was holding it under a right of occupancy; and that it had already been decided by the Revenue Court as between him and the plaintiffs that he was so holding it, and such decision was a bar to a fresh adjudication as to the title under which he was holding it. It appeared that the plaintiffs had caused a notice of ejectment to be served upon the defendant in respect of such land under the provisions of ss. 36 and 37 of Act XVIII of 1873, alleging that he held it under such lease and the same had expired. The defendant had contested his

* Second Appeal, No. 843 of 1880, from a decree of Hakim Bahat Ali, Subordinate Judge of Gorakhpur, dated the 10th May 1880, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 13th December, 1879.

(1) I. L. R., 2 All. 616.

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liability to be ejected, under the provisions of s. 39, claiming to hold such land under a right of occupancy. The Revenue Courts decided in the proceedings which then followed that the defendant had not acquired such land under such lease, but held it under a right of occupancy. Both the lower Courts held in this present case that they were not competent to determine the defendant's status as regards such land, and that the decision by the Revenue Court was a bar to a fresh determination of his status as regards the same; the lower appellate Court finding, however, upon the evidence that the defendant held such land under such lease and not under a right of occupancy.

On second appeal the plaintiffs contended that the Civil Courts were competent to entertain the suit, and that the former decision of the Revenue Court as to the defendant's title was not a bar to its determination by the Civil Courts.

Munshi Kashi Prasad for the appellants.

Munshi Hanuman Prasad and *Maulvi Mehdi Hasan* for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—There can be no doubt that the suit out of which the present appeal has arisen is one properly cognizable by the Civil Courts. The plaintiffs seek to oust the defendant as a trespasser who has wrongfully retained possession of land which he ought to have surrendered on the expiration of the term of his lease. The suit being one of a nature clearly and exclusively cognizable by the Civil Courts, the only remaining point for consideration is whether they are debarred from adjudicating it by the decision of the revenue authorities on the application preferred to them by the defendant under s. 39 of the Rent Act. The issue decided by them was whether the defendant had entered upon the holding as a tenant or in virtue of his possession as a lessee; and they decided that his status was that of a tenant. That was an issue which, if they were competent to decide incidentally for the purpose of disposing of the application made to them, they were certainly not competent to decide finally so as to preclude a re-adjudication

of it by the Civil Courts. By this decision the matter in issue did not become a *res judicata*. Nor indeed do the provisions of s. 13, Act X of 1877, apply to applications such as those under s. 39 of the Rent Act. The lower appellate Court has found as a matter of fact upon the evidence that the land in suit has been cultivated by the defendant in virtue not of a tenant-right, but of his position as a lessee, and is wrongfully retained by him after the expiry of the term of his lease. Upon that finding the plaintiffs were entitled to a decree; and we accordingly decree the claim and appeal with costs by reversal of the decrees of the lower Courts.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

KHUSHALO (DEFENDANT) v. BEHARI LAL AND ANOTHER (PLAINTIFFS).*

1881
February 14.

Acknowledgment of debt contained in unregistered document—Admissibility of document as evidence of acknowledgment—Act XV of 1877 (Limitation Act), s. 19 and sch. ii, Nos. 57, 85.

The nature of the pecuniary transactions between *B* and *G* were such that sometimes a balance was due to the one and sometimes to the other. On the 1st October, 1875, there was a balance due to *B*. During the ensuing year, as computed in the account, *G* made payments to *B* exceeding such balance. On the 19th November, 1876, a balance of Rs. 3,500 was found to be due from *G* to *B*. On the 11th December, 1876, *G* executed a conveyance of certain land to *B*, for which such debt was partly the consideration. In such conveyance *G* acknowledged his liability in respect of such debt. He died before such conveyance was registered and it did not operate. On the 18th November, 1879, *B* sued *G*'s widow for such debt. *Held* that such conveyance was admissible as evidence of the acknowledgment by *G* of his liability for such debt, notwithstanding such conveyance was not registered; that, applying No. 85, sch. ii of Act XV of 1877, such debt was not barred by limitation when such acknowledgment was made; and that, if that article was not applicable, but the period of limitation began to run from the time each item composing such debt became a debt, still such debt would not have been barred when such acknowledgment was made, as the debt with which the year computed from the 1st October, 1875, opened, was extinguished by payments made by *G* in the course of that year.

THE plaintiffs, who were by occupation money-lenders, stated in their plaint that Gulzari Lal, the deceased husband of the defendant, had had pecuniary dealings with them for a long time; that on the 19th November, 1876, the accounts between them and Gulzari Lal were stated and a balance was found due to them of,

* First Appeal, No. 38 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 30th January, 1880.

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 KHUSHALO
 v.
 BEHARI LAL.

principal with interest, Rs. 35,000, which Gulzari Lal promised to pay on demand; that on the 11th December, 1876, Gulzari Lal executed a conveyance to them of certain land for Rs. 10,000, such conveyance being signed on his behalf by the defendant his wife, as he was too infirm to sign the same himself; that Rs. 3,500 of the purchase-money was credited to Gulzari Lal, and it was proposed that the balance should be retained by them as a deposit; that Gulzari Lal died shortly after this, and the defendant refused to procure the registration of the conveyance; that after the balance above-mentioned had been found to be due to them Gulzari Lal, and after his death the defendant, borrowed, on different occasions, up to the 4th October 1877, sums amounting to Rs. 2,250-12-0; that Gulzari Lal, and after him the defendant, paid to them on different occasions up to the 20th August, 1877, sums amounting to Rs. 1,321-12-6, after which date the defendant had paid nothing; and that the cause of action had arisen on the 1st March, 1878, the date of demand and of the defendant's default. The plaintiff claimed accordingly to recover, with interest, the balance found due to them on the 19th November, 1876, and the further advances made by them subsequently to that date. The suit was instituted on the 18th November, 1879. The conveyance mentioned in the plaint purported to be signed for Gulzari Lal by the defendant his wife, "with her husband's permission." It contained the following recital amongst others: "And having received all the said purchase-money in full, with this detail, that a credit is given of Rs. 3,500 due by me according to accounts to the said *kothi*, or firm, up to date, and having received from the vendees Rs. 6,560 the balance of the consideration-money in cash through Lala Hira Lal gomash-ta of the said firm, I have given the vendees such possession and occupancy as was held by myself." It appeared from the account-books of the plaintiffs that on the 8th October, 1867, a balance of Rs. 157-11-6 was found due to the plaintiffs by Gulzari Lal: on the 26th September, 1868, a balance of Rs. 520-9-9: on the 14th October, 1869, a balance of Rs. 1,708-5-6: on the 4th October, 1870, a balance of Rs. 1,572-6-0: on the 3rd September, 1871, a balance of Rs. 867-9-0: on the 23rd October, 1871, a balance of Rs. 707-10-3: on the 1st October, 1875, a balance of Rs. 2,106-8-3. Between the last date and the 19th November, 1876, the payments

made by Gulzari Lal to the plaintiffs amounted to a sum of Rs. 4,000 odd. The defendant set up as a defence, *inter alia*, that the claim for the item of Rs. 3,500 was not barred by limitation. The Court of first instance held, on grounds which it is not material to state, that such claim was not barred by limitation; and gave the plaintiffs a decree as claimed. The defendant appealed to the High Court impugning the grounds on which the Court of first instance had held that such claim was not barred by limitation.

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KHUSHALO
v.
BEHARI LAL.

Munshi Hanuman Prasad and Pandit Bishambhar Nath for the appellant.

Mr. Conlan and the Junior Government Pleader (Babu Dwarka Nath Banarji) for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.— The plaintiffs' case is that the defendant's husband, Munshi Gulzari Lal, had a banking account with their firm, depositing sums of money with them on which he drew; that on the 19th November, 1876, the account was adjusted, and the balance against Gulzari Lal was Rs. 2,158-4-0, principal, and Rs. 1,341-12-0, interest, total, Rs. 3,500, which was admitted at the time, that an acknowledgment of this balance appears in a deed of sale dated the 11th December, 1876, executed by Gulzari Lal in favour of plaintiffs in respect of certain property, the said sum being given in the deed as part of the sale-consideration; the sale, however, fell through; that after Gulzari Lal's death the defendant borrowed Rs. 2,250-12-0, on different occasions; and that after deducting certain sums paid in satisfaction, a sum of Rs. 4,476-15-6, with interest, Rs. 1,263-5-6, is due; and the plaintiffs sue to recover. The defendant's reply is that Gulzari Lal did not owe anything to plaintiffs, nor is anything due by her, and that the item of Rs. 3,500 is barred by limitation. The lower Court has decreed the claim. The first question we have to deal with in appeal is whether the item of Rs. 3,500 or any part is barred by limitation. The acknowledgment of Gulzari Lal's liability for this sum contained in the deed of sale dated 11th December, 1876, will give a new period of limitation computed from that date, and will make the suit within time, and the fact that the deed is not

1881 registered will not make it inadmissible as evidence of the acknowledgment of the debt. We find no reason to doubt that this deed of sale was executed by Gulzari Lal and signed on his behalf by the defendant as his agent. This is sufficiently shown by the evidence of the writer of the deed and Hira Lal the manager of plaintiffs' firm, the reason for the wife putting his name to the deed being that he was at the time in a feeble state of health, and in fact died three days after. At the time this acknowledgment was made the debt was not barred by limitation, so as to deprive this acknowledgment of effect to extend the period. The nature of the transactions between plaintiffs and Gulzari Lal was such that sometimes a balance was in favour of plaintiffs and sometimes of Gulzari Lal, and we are disposed to hold that art. 85, sch. ii of the Limitation Act, would apply, and the limitation for the recovery of the debt would run from the close of the year in which the last item admitted or proved is entered in the account; but if the limitation is to run from the time each item composing the sum become a debt due to the plaintiffs, still it would not have been barred when the acknowledgment was written, for the accounts show that the payments made by Gulzari Lal in 1875 extinguished the debt of Rs. 2,108-8-3 with which that year opened. The correctness of the accounts and the liability of Gulzari Lal for the sum of Rs. 3,500 are testified by the plaintiffs' books, by the acknowledgment in the sale-deed, and by an entry in a memorandum-book of Gulzari Lal's which is not disputed, that on the 19th November, 1876, the above sum was due, and this fact favours the belief that the acknowledgment in the deed of sale which was executed three weeks later was made at the instance of Gulzari Lal. With regard to the claim in respect of the item of Rs. 2,250, we see no reason to distrust the evidence. It was orally contended that plaintiffs have no right to debit against defendant payments they made for expenses of Kuttra as it is not defendant's property, but we do not find that this objection was taken in the Court below, and it has not been supported. Although we take a different view of the limitation applicable, we affirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Spankie.

1881
February 16.

MAHABIR PRASAD (AUCTION-PURCHASER) v. DHUMAN DAS
(DECREE-HOLDER).*

Sale in execution—Act X of 1877 (Civil Procedure Code), s. 313.

A person who purchases immoveable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable therein, is not entitled to the benefit of the provisions of s. 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchase valueless property.

ONE Mahabir Prasad, who had purchased certain immoveable property at a sale in execution of a decree, which had taken place on the 22nd September, 1879, applied to the Court executing the decree, under s. 313 of Act X of 1877, to set aside such sale on the ground that the judgment-debtor had no saleable interest in such property, his interest therein having been previously sold in execution of a decree on the 20th June, 1878. The Court refused this application on the ground, amongst others that the applicant had purchased knowing that the previous sale had taken place. The applicant appealed to the High Court.

Lala Latta Prasad for the appellant.

Pandit Bishambhar Nath for the respondent.

The judgment of the Court (PEARSON J., and SPANKIE, J.) was delivered by

PEARSON, J.—As the appellant was himself the purchaser of the property at the former sale, and again knowingly purchased it at the recent sale, he does not appear to be entitled to the benefit of the provisions of s. 313 of the Code, which were presumably designed for the protection of persons who innocently and ignorantly purchased valueless property. Seeing no sufficient reason to interfere, we dismiss the appeal with costs.

Appeal dismissed.

* First Appeal, No. 168 of 1880, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 12th June, 1880.

1881

February 16. *Before Mr. Justice Spankie and Mr. Justice Oldfield.*
ZAHUR-UN-NISSA (DEFENDANT) v. KHUDA YARKHAN (PLAINTIFF).*

Withdrawal of suit—Act X of 1877 (Civil Procedure Code), s. 373—Plea taken for the first time at the hearing of second appeal.

The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged at the hearing of the second appeal.

Quære.—Whether under s. 373 of Act X of 1877 the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with.

THE plaintiff in this suit claimed possession of a share in a landed estate called Dam Khoda and an account of the profits of such estate. It appeared that one Mohabbat Khan died leaving as his heirs defendant No. 1, his widow, defendant No. 2, his son, and defendant No. 3, his daughter. On the 18th and 20th April, 1878, defendant No. 3 conveyed to the plaintiff her share in the moveable and immoveable estate of her deceased father. On the 29th January, 1879, the plaintiff brought a suit against the three defendants for possession of the defendant No. 3's share in Dam Khoda, claiming by virtue of such conveyance. Defendant No. 1 set up as a defence to this suit that she was in possession of Dam Khoda in lieu of a dower debt of Rs. 15,000. The plaintiff thereupon, on the 19th March, 1879, applied for permission to withdraw the suit, with liberty to institute a fresh one. This application was granted on that same date. The plaintiff subsequently brought a fresh suit, the present one, for possession of defendant No. 3's share in Dam Khoda. In this suit, alleging that, assuming that a dower of Rs. 15,000 had actually been settled on defendant No. 1, and had not been paid, defendant No. 1 had realized the amount out of the profits of Dam Khoda and the other properties of her deceased husband, he prayed that an account might be taken from the date of Mohabbat Khan's death of the profits of his estate in the possession of defendant No. 1. The Court of first instance dismissed the

* Second Appeal, No. 1004 of 1880, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 7th April, 1880, modifying a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 11th October, 1879.

suit. On appeal by the plaintiff the lower appellate Court gave him a decree for a portion of the property claimed.

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On second appeal by defendant No. 1 it was contended on her behalf, for the first time, at the hearing of the appeal, that the former suit between the parties had been allowed to be withdrawn with liberty to institute a fresh one, contrary to the provisions of the law.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the appellant.

Mr. *Conlan* and *Mir Zakur Husain* for the respondent.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows:—

SPANKIE, J.—We were pressed by the pleader for appellant to consider another plea to the effect that the power to dismiss a suit with liberty to bring a fresh one for the same matter was limited to cases which fail by reason of some point of form, whereas when the plaintiff withdrew the former suit he did not do so on a point of form, but because the defence was such that he could not have succeeded in his suit had he gone on with it. The case of *Watson v. The Collector of Rajshahye* (1) was cited in support of this contention. But the plea was one which was never taken here in the memorandum of appeal and not as far as we can discover was it taken below. Moreover the wording of s. 373, Act X of 1877, is different from that of s. 97 of Act VIII of 1859, which permitted withdrawal for sufficient grounds. But s. 373 of the new Act, whilst providing permission to withdraw a suit where it must fail by reason of some formal defect, enlarges the discretion of the Court and adds “or where there are sufficient grounds.” We think it too late now to consider whether the discretion has been exercised rightly, though it may be that we could not say that it was otherwise exercised. It is sufficient to observe that the plea was never taken in either of the Courts below and was not taken here until the case came on for hearing.

(1) 3 B. L. R., P. C., 48.

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February 21. *Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*
JOAKIM (APPELLANT) v. THE SECRETARY OF STATE FOR INDIA
AND OTHERS (RESPONDENTS).*

Insolvent judgment-debtor—"Unfair preference"—Act X of 1877 (Civil Procedure Code), s. 351.

J, in pursuance of a previous agreement with *B*, and on being pressed by *B*, who had a pecuniary claim against him, which nearly equalled half the amount of all the pecuniary claims against him, assigned to *B* the whole of his property by way of sale, in consideration in part of *B*'s pecuniary claim against him. *Held* that by such assignment *J* did not give *B* an "undue preference" to his other creditors, within the meaning of s. 351 of Act X of 1877.

ONE J. W. Joakim, having been arrested in execution of a decree for money made by the Court of Small Causes at Allahabad, applied to be declared an insolvent. This application contained a list of pecuniary claims against the applicant amounting to Rs. 13,278-4-4, and the names of forty creditors. The application was opposed by four creditors, *viz.*, one Debi Din, the Allahabad Municipality, the Secretary of State for India, and one Callu Mal. The ground, amongst others, upon which the application was opposed was that, after the institution of the suit in the execution of the decree in which he had been arrested, and from which arrest he was claiming protection, the applicant had transferred all his property to one creditor, Dr. Brown, thereby giving that creditor an unfair preference to his other creditors, within the meaning of s. 351 of Act X of 1877, and thus disentitling himself to be declared an insolvent. It appeared that on the 16th February, 1880, a suit was instituted in the name of the Secretary of State for India against the applicant in the Court of Small Causes at Allahabad, and the 25th February was fixed for the final hearing of that suit. On the 24th February the applicant and his wife executed an assignment of all their property to Dr. Brown. On the 25th February the applicant obtained an adjournment of the hearing of this suit till the 3rd March, when it was tried and the decree made against him in execution of which he had been arrested. The deed of assignment recited that, in consideration of loans and sums paid

* First Appeal, No. 124 of 1880, from an order of R. D. Alexander Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 29th July, 1880.

to and on account of the applicant, and in pursuance of an agreement entered into at the time the first loan was contracted, the applicant sold all his property, and his wife sold all her property, to Dr. Brown for the sum of Rs. 2,107, which having been deducted from the debt due of Rs. 5,722-0-2 left a balance of Rs. 3,615-0-2. The deed also recited that Dr. Brown, on condition of Rs. 10 a month being regularly paid, leased the property back again to the applicant's wife in whose possession it was to remain. The Judge of the Small Cause Court, exercising the powers of a Subordinate Judge, held that, inasmuch as Joakim had transferred all the property he had in the world to one creditor, who, though he might have strong claims on him, was not, according to the insolvency law, entitled to more than his share, Joakim had thereby given an unfair preference to Dr. Brown, his creditor, within the meaning of s. 351 of Act X of 1877, in this disposition of his property. The Judge therefore refused the application. The applicant appealed to the High Court on the grounds that the assignment did not amount to a preference of Dr. Brown to the other creditors; and that, if it amounted to a preference, it did not amount to an undue preference.

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Mr. *Hill* for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) for the Secretary of State for India, one of the respondents.

The Court (STUART, C. J., and OLDFIELD, J.) delivered the following judgment :—

STUART, C. J.— In this case the applicant Joakim prayed to be declared an insolvent under Chapter XX, Act X of 1877, and his application, after having been considered by the Subordinate Judge, was refused by that officer on the ground that, although the deed of assignment by Joakim to Dr. Brown was not executed with the intent to defraud the other creditors, yet that it was unfair to them within the meaning of s. 351, Chapter XX of Act X of 1877. In appeal to this Court Joakim objected that the assignment to Dr. Brown did not amount to a preference over his other creditors, but that even if it did it was not an unfair preference. At the hearing of the appeal the

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Collector of Allahabad and the other respondents did not appear, and it was stated to us by the Government Pleader that they did not wish further to interfere with Joakim's application. It was therefore left to Mr Hill, counsel for Joakim, to make out a sufficient *prima facie* case in this appeal, and that learned gentleman addressed to us a most able argument in support of the deed of assignment by Joakim in favour of Dr. Brown, in the course of which he referred to numerous authorities which appeared to favour his contention. But the withdrawal of the Collector of Allahabad and the other respondents from this appeal renders it unnecessary for us to enter into the consideration of much that was brought before us by the learned counsel. The creditors including Dr. Brown to whom Joakim is indebted are stated to be forty in number, their whole debt aggregating the sum of Rs. 13,278-4-4, Dr. Brown's claim alone amounting to about Rs. 6,000, or nearly one half of the whole debts. He was thus by far the largest creditor, while the value of the property transferred to him by the deed of assignment was little more than Rs 2,000. The debt to Brown was, as we have shown, largely in excess of this sum, and it was a debt justly due, and the other element of pressure by Dr. Brown on Joakim is clearly apparent in the case. The deed therefore is not open to objection on the ground of want of just indebtedness to Dr. Brown and of pressure on his part on Joakim. Nor can it be said to give an unfair preference to Dr. Brown over the other creditors within the meaning of s. 351 (c), Act X of 1877. The present appeal must therefore be allowed. For the reasons stated, and in the absence of all opposition on the part of any of the other creditors, Joakim is entitled to be declared an insolvent within the intent and meaning of s. 351, Act X. of 1877, and the case will go back to the Subordinate Judge for final disposal.

ORDFIELD, J.—I concur in allowing the appeal with costs. The applicant Joakim is entitled to be declared an insolvent and the case should go back to the Judge for disposal under Chapter XX. There is evidence that the assignment was made in pursuance of a previous agreement with Dr. Brown, the debt was due to Dr. Brown, and the assignment was not the spontaneous act of

Joakim but done on pressure applied by Dr. Brown. Under such circumstances Joakim cannot be held to have given, by the assignment, an unfair preference to Dr. Brown, within the meaning of s. 351 of Act X of 1877.

Cause remanded.

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Before Mr. Justice Spinkis and Mr. Justice Straight.

SITA RAM AND ANOTHER (PLAINTIFFS) v. MAHIPAL AND ANOTHER
 (DEFENDANTS).*

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 February 21.

Questions for Court executing decree—Separate Suit—Adjustment of decree—Act X of 1877 (Civil Procedure Code), ss. 244, 258—Assignment of decree.

* *M*, who held a decree against *S* for possession of certain immoveable property and costs, assigned such decree to *S* by way of sale, agreeing to deliver the same to him on payment of the balance of the purchase-money. He subsequently applied for execution of the decree against *S*, claiming the costs which it awarded. *S* thereupon paid the amount of such costs into Court, and, having obtained stay of execution, sued *M* for such decree, claiming by virtue of such assignment. The lower Court held that the suit was barred by the provisions of s. 244 of Act X of 1877, and also, treating such assignment as an uncertified adjustment of such decree, that it was barred by the terms of the last paragraph of s. 258 of that Act. *Held* that the suit was not barred by anything in either of those sections. The words "any Court" in the last paragraph of s. 258 refer to proceedings in execution and to the Court or Courts executing a decree.

THE plaintiffs in this suit claimed the delivery of a certificate of sale dated the 19th April, 1877, and a decree dated the 12th March, 1878, basing their claim on a deed of sale dated the 22nd August, 1879, whereby the defendants agreed to deliver those documents to them. It appeared that the defendants had sued the plaintiffs for possession of a two-fifths share of a certain house, basing this suit on the certificate of sale. The defendants obtained the decree in that suit, dated the 12th March, 1878, of which the plaintiffs claimed delivery in this suit. Subsequently the defendants agreed to sell to the plaintiffs the share of such house awarded to them by that decree, and on the 22nd August, 1879, executed a deed of sale in favour of the plaintiffs. This document provided that, on payment by the plaintiffs of the balance of the purchase-money, the defendants should deliver the sale-certificate and the

* Second Appeal, No. 960 of 1880, from a decree of S. M. Moens, Esq., Judge of Mirzapur, dated the 10th June, 1880, affirming a decree of Maulvi Fida Husain, Munsif of Mirzapur, dated the 15th March, 1880.

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decree to the plaintiffs. In December, 1879, the defendants took out execution of the decree against the plaintiffs for the recovery of the costs awarded thereby. The plaintiffs, with reference to the agreement contained in the deed of sale, objected to the execution of the decree, at the same time paying the amount of such costs into Court. The Court executing the decree ordered that execution thereof should be stayed for three months in order to enable the plaintiff to take the proper steps to enforce that agreement. The plaintiffs accordingly brought the present suit for the sale-certificate and the decree. The Court of first instance, regarding the agreements as an adjustment of the decree, held that, as the adjustment had not been certified to the Court executing the decree under the provisions of s. 258 of Act X of 1877, no Court could take notice of the adjustment, and consequently the suit was not maintainable. It further held that the suit was barred by the provisions of s. 244 of Act X of 1877, the question between the parties being one relating to the execution of the decree, which should be determined by the Court executing the decree and not by separate suit. On appeal by the plaintiffs the lower appellate Court also held that, having regard to s. 258, the suit was not maintainable, as the adjustment of the decree not having been certified could not be taken notice of by any Court.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Kashi Prasad* for the appellants.

Babu Jogindro Nath Chaudhri for the respondents.

The judgment of the Court (SPANKIE J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The defendants-respondents on the 12th March, 1878, obtained a decree upon a sale-certificate for the partition and possession of a two-fifth share of a house against Sita Ram and the ancestor of Kashi plaintiffs-appellants. The decree was in process of execution when an arrangement was come to the terms of which were embodied in a sale-deed dated 22nd of August, 1879. By this document it was provided that in consideration of the sum of Rs. 90 the decree-holders would deliver over to the judgment-debtors the sale-certificate and the decree founded upon it. By

way of earnest-money Rs. 25 was paid on account and the balance was to be forthcoming on the certificate of sale and the decree being handed over. This the decree-holders failed to do and on the contrary pursued these proceedings in execution, causing Sita Ram to be arrested in December, 1879. Objection was necessarily made by him and further execution was stayed for three months in order to enable him to bring a suit. This he has now done in conjunction with Kashi, the legal representative of his deceased co-judgment-debtor, and the relief he asks is that the defendants may be compelled to perform their contract of 22nd August, 1879, by being ordered to deliver up the sale-certificate and decree. The two lower Courts have dismissed the claim, holding it to be prohibited by ss. 244 and 258 of the Civil Procedure Code. We are clearly of opinion that the suit is maintainable and is in no way barred. The words "any Court" in the last paragraph of s. 258 have reference to proceedings in execution and refer to the Court or Courts executing a decree. They have no application to a Civil Court entertaining a separate suit asking for specific and legitimate relief of the character now prosecuted by the plaintiffs-appellants. The lower Courts have formed an altogether erroneous view and their decision cannot be sustained. The appeal is decreed with costs and the plaintiffs' claim will be allowed. Upon payment into Court of the balance due under the sale-deed of August, 1879, they will be entitled to receive the sale-certificate and decree, and in default of these being delivered over within fourteen days from the payment of such money being notified to the defendants, the plaintiffs will be entitled to proceed in execution.

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Appeal allowed.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

February 21.

ROSHAN SINGH AND OTHERS (DEFENDANTS) v. HAR KISHAN SINGH (PLAINTIFF).*

Guardian and minor—Hindu Law—Act XL of 1858.

The mother and guardian of a Hindu minor, although a certificate of guardianship has not been granted to her under Act XL of 1858, may deal with the estate of the minor, within the limits allowed by the Hindu Law.

*Second Appeal, No. 460 of 1880, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th February, 1880, reversing, a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 30th September, 1879.

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The plaintiff in this suit, a Hindu, claimed possession of his share in a certain joint undivided family property, which his mother, during his minority, had conditionally sold to the defendants. He alleged that his mother was not competent to mortgage such share, as she had not taken out a certificate of guardianship under Act XL of 1858, and that such share had been mortgaged without lawful necessity. The defendants set up as a defence that the mother of a Hindu minor was competent as his natural and legal guardian to mortgage his estate for lawful purposes, and that the plaintiff's mother had made the mortgage impugned in this suit for such purposes. It appeared that the joint undivided family property of which the plaintiff now claimed his share was under mortgage, and that notice of foreclosure had been given, and the year of grace would have expired on the 18th August, 1872. In order to save the property the members of the plaintiff's family, including the plaintiff's mother, as guardian of the plaintiff, the plaintiff being a minor, joined in making a conditional sale of the property to the defendants, the deed of conditional sale bearing date the 14th August, 1872. With the money advanced to them under this conditional sale they satisfied the debt of the prior conditional vendees. The Court of first instance held that the plaintiff's mother was competent as his natural and legal guardian to mortgage her minor son's estate for lawful purposes, and that she did not require to hold a certificate of guardianship under Act XL of 1858, and that she had made the mortgage complained of by the plaintiff for such purposes, viz., for the payment of ancestral debts, in good faith, and such mortgage was binding on him; and it dismissed the suit. On appeal by the plaintiff the lower appellate Court held that the plaintiff's mother was not competent as his natural and legal guardian to alienate his property in any way, and, reversing the decree of the first Court, gave the plaintiff a decree.

The defendants appealed to the High Court, contending that a Hindu widow was competent as the natural and legal guardian of her minor son to mortgage his property for lawful purposes.

Messrs. Conlan, Howard, and Hill for the appellants.

Pandit Ajudhia Nath and *Lala Latta Prasad* for the respondent.

The Court (STUART, C.J., and SPANKIE, J.) made the following

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ORDER OF REMAND.—The judgment of the lower appellate Court appears to be erroneous; certainly it is contrary to the precedents of this Court. The Judge cites a decision of a Division Bench of the Calcutta Court in support of his ruling—*Abassi Begam v. Maharanee Rajroop Koonwar* (1). In the same volume there is another decision of a Division Bench of the same Court and of a later date—*Soonder Narain v. Bennud Ram* (2)—which takes the opposite view of the case, which indeed is in accordance with the rulings of this Court, to the effect that the mother and guardian of a Hindu minor, though not a guardian appointed under Act XL of 1858, when acting *bond fide*, and under the pressure of necessity, may sell his real estate to pay ancestral debts and to provide for the maintenance of the minor. This Court has ruled in *Hait Singh v. Thakoor Singh* (3) that s. 2 Act XL of 1858, does not preclude the natural and legal guardian of a Hindu minor from dealing with his property, within the limits allowed by the Hindu law, without having acquired a certificate of administration from the Civil Court, and that ruling is still followed. That judgment distinctly states that the act of the guardian must be one within the limits of the Hindu law. Whether it was or was not so has not been determined by the Court below. It does not appear to be denied in appeal before the Judge that the plaintiff was a member of a joint and undivided family, but the character of the alleged debt and liability is impugned. The lower appellate Court should ascertain and determine whether, as alleged by the plaintiff, the alienation of his property by Sheoka Kuar on the 14th August, 1872, was made without any pressing necessity, and to the injury of the minor, or, as contended by the defendants, whether the transaction was one done in good faith, for the satisfaction of ancestral debts, and for the benefit of the minor. To enable the Court to determine these points we remand the case to the lower appellate Court.

(1) I. L. R., 4 Calc., 33.

(2) I. L. R., 4 Calc., 76.

(3) N.-W. P. H. C. Rep., 1872, p. 57.

1881
February 28.

CIVIL JURISDICTION.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SHADI AND ANOTHER (PLAINTIFFS) v. GANGA SAHAI (DEFENDANT).*

Questions for Court executing decree—Separate Suit—Adjustment of Decree—Act X of 1877 (Civil Procedure Code), ss. 244, 258.

S, alleging that a money-decree against him held by *G* had been adjusted out of Court by a payment in cash and the delivery of certain property and that *M* had notwithstanding such adjustment applied for execution of such decree and recovered the amount thereof, as the Court executing such decree had refused to determine whether it had been satisfied on the ground that such adjustment had not been certified, sued *M* for the money which he had paid him out of Court. *Held* that the suit was not barred by the provisions of s. 244 of Act X of 1877 or of s. 258 of that Act. The last paragraph of s. 258 means that the Court executing the decree shall not recognize an uncertified payment or adjustment out of Court. It does not prohibit a suit for money paid to a decree-holder out of Court, and the payment of which, not being certified, could not be recognized, and which the decree-holder had not returned, but had misappropriated, by taking out execution of the decree a second time and securing the amount in full through the Court.

THIS was an application to the High Court by the plaintiffs in a suit for revision under s. 622 of Act X of 1877 of the decree of the appellate Court in the case. The facts of the case are sufficiently stated in the judgment of the High Court.

Pandit *Nand Lal* for the plaintiffs.

Babu *Oprokash Chandar Mukarji* for the defendant.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

SPANKIE, J.—The defendant held a decree against the plaintiffs, who say that they satisfied it by payment of Rs. 50 in cash and by giving a bullock worth Rs. 30, and that the decree was returned to them; but the defendant executed the decree a second time against them, and the Court disallowed the objections of plaintiffs that it had been fully satisfied out of Court, and that they held the decree. They now sue to recover the amount paid over to the defendants out of Court. The defendant denies receipt of the

* Application, No. 68B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of H. G. Keene, Esq., Judge of Meerut, dated the 10th May, 1880, reversing a decree of Syed Zakir Husain, Munsif of Meerut, dated the 14th April, 1880.

money and delivery of the bullock: the decree was lost and thus came into possession of the plaintiffs. The Munsif, holding that the facts alleged by the plaintiffs had been fully established, decreed the claim. In appeal the Judge held that s. 244 distinctly prohibits the decision by separate suit of "any questions arising between the parties relating to the discharge or satisfaction of the decree." In this case the Judge observes it is contended that the decree had been satisfied out of Court, though without the Court being certified, and that the present execution was in fact making the debtors pay a second time: this plainly was a question relating to the matters as to which the suit is not to be brought. He therefore decreed the appeal and reversed the decree of the first Court.

It is urged by the plaintiffs on the revision side that the decision is erroneous: the money now in suit was paid out of Court by private arrangement, and not in execution of the decree, and s. 244 of Act X of 1877 does not apply. S. 244 does not, we think, apply to the case before us. The Court executing the decree did not determine whether or not there had been any satisfaction of the decree in the mode alleged by the judgment-debtors, because there had been no certification of such payment to the Court whose duty it was to execute the decree, as is required by the terms of s. 258 of Act X of 1877 as amended by Act XII of 1879. The Court therefore did not recognize any such payment or arrangement. It is the essence of s. 244 of the Code that there should be a determination of one of the questions (a), (b), and (c). The question as to the satisfaction and discharge of the decree would have fallen under (a) and (c) of the section, but it could not be determined, as the Court, for the reasons given above, could not recognize any such discharge or satisfaction even if made.—*Gunamain Dasi v. Pran Kishori Dasi* (1). The determination of any question under the section must be a judicial determination, and the judgment must be one which if not appealed against would be definitive, or which, if confirmed by some other authority, would be definitive, thus putting an end to a suit by giving redress to one party, or by discharging the other party. It is on this account that no separate suit is permitted, but the order passed

(1) 5 B. L. R., 223.

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being a decree, it is appealable as such. —(See s. 2, “decree,” and s. 540, Act X of 1872, as amended.) “Decree” means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, where such adjudication, so far as the Court expressing it, decides the suit or appeal. It was contended on behalf of the defendant that the words “any Court” referred to in s. 258 of the Code precludes any subsequent assertion in a suit like the present of any payment or adjustment of a decree. The words are : “No such payment or adjustment shall be recognized by any Court, unless it has been certified as aforesaid.” This means that the Court executing the decree shall not recognize such payment or adjustment, nor shall any Court do so which may have to deal with any averment of such payment or adjustment of a decree during the pendency of execution-proceedings. But where any Court executing a decree, or any Court reviewing as a Court of appeal the orders of such Court, refuses to grant redress or entertain the question of payment or satisfaction, because it was not certified to the Court executing the decree, there is no prohibition against a suit for the recovery of money which the plaintiff avers was paid to the decree-holder out of Court, but which could not be admitted as a payment in the absence of certification to the Court executing the decree, and which the decree-holder had not returned, but misappropriated, by taking out a second execution of his decree and securing the amount in full through the Court. A person who, by private agreement out of Court between the decree-holder and himself, satisfies a decree does so under an implied agreement that the satisfaction of the decree shall be certified to the Court, and that he shall be relieved from further process in regard to it ; and if the money paid is not applied to the satisfaction of the decree but for other purposes, the decree-holder has committed a breach of such agreement, and has acted, as is alleged in this case, fraudulently. The suit is not one brought to recover the money paid in the second execution, but one to recover money which had been paid on the first occasion, but which had not been used for the purpose of satisfying the decree owing to the fraud committed by the decree-holder. Upon this view the case of *Soojun Mundul v. Woozeer Mundul* (1) is

(1) 6 W. R., Civil References, 20.

altogether in point. Again the decree-holder taking payment out of court must be regarded as a trustee for the judgment-debtor of the money paid to him. This is the view entertained by the Full Bench of the Presidency Court in the case already cited. That decision notices the case of *Arunachella Pillai v. Appavu Pillai* (1). In that case the Court was not unanimous in taking a different view from that of the Presidency Court, and an examination of it shows that the claims were not identical, as in the Madras suit the plaintiff sued to recover money that was levied in the execution of the decree by the Court, whereas in the Presidency case, as in the one before us, the plaintiff sued to recover the money first paid, for which, as the Court held, the decree-holder must be regarded as a trustee for the plaintiff, and as such he was liable to refund it. Such being our view of the case, we must decree the appeal, and as the Judge has thrown out the case on a preliminary point of law, we reverse his decree and remand the case for re-trial on the merits. Costs will abide the result.

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Cause remanded.

APPELLATE CIVIL.

1881
March 4.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

JUALA SINGH AND ANOTHER (PLAINTIFFS) v. NARAIN DAS (DEFENDANT).*

Filing private award in Court—Amendment of plaint taking case out of scope of Ch. 37 of Act X of 1877—Act X of 1877 (Civil Procedure Code), ss. 520(a), 525, 526—Appeal.

By the amendment of the plaint, a case under s. 525 of Act X of 1877 was taken out of the scope of Chapter XXXVII of that Act. *Held* that, this being so, the decree of the Court of first instance was appealable.

Held also, where a private award determined a matter not referred to arbitration, that a claim under s. 525 of Act X of 1877 that such award should be filed in Court was properly dismissed.

THE plaintiffs, who claimed a right of pre-emption in respect of certain buildings purchased by the defendant, and the defendant,

* Second Appeal, No. 979 of 1880, from a decree of R. M. King, Esq., Judge of Saharanpur, dated the 9th July, 1880, reversing a decree of Munshi Baij Nath, Munsif of Muzaffarnagar, dated the 2nd March, 1880.

(1) 3 Mad. H. C. Rep., 188.

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who denied such right, entered into an agreement in writing to refer this matter to the arbitration of two persons named in such agreement. This agreement, which was dated the 18th May, 1879, provided that the arbitrators should award such portion of such buildings to the plaintiffs as they might think proper, and should fix the price which the plaintiffs should pay to the defendant for such portion. The arbitrators, by an award dated the 1st June, 1879, awarded a certain portion of such buildings to the plaintiffs, directing that they should pay the defendant Rs. 100 for the same. In addition to this they also determined certain other matters which had not been referred to them. The plaintiffs made an application under s. 525 of Act X of 1877 to have the award filed in Court. The defendant objected to the validity of the award, on the ground, amongst others, that it had determined matters not referred to arbitration. On the 27th February, 1880, after the first hearing of the suit, the plaintiffs, in pursuance of an order made by the Munsif on the previous day, amended the plaint, by asking that "the award might be enforced and acted upon," that is to say, that possession of the portion of the buildings which had been awarded to them might be given to them on payment of Rs. 100. The Munsif held that, although the arbitrators had determined matters not referred to arbitration, yet, as the suit was not one to have the award filed, but to have it enforced, that part of the award which was upon a matter referred to arbitration might be enforced; and accordingly gave the plaintiffs a decree "for the enforcement of the award" to that extent, directing the plaintiffs to pay Rs. 100 within fifteen days. On appeal by the defendant the lower appellate Court held that, inasmuch as the arbitrators had determined matters not referred to them, the award should not be filed, and it made an order rejecting plaintiffs' "claim to file the award."

On second appeal the plaintiffs contended that the order of the Munsif was not appealable; that the arbitrators had not exceeded their powers; and that, assuming that the award was defective, it should not have been entirely set aside.

Munshi *Kashi Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

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PEARSON, J.—The present suit was commenced by an application on the part of the plaintiffs under s. 525 of the Civil Procedure Code. The Munsif, misunderstanding the provisions of that section, required them to amend their plaint, and the Judge finds that the amendment was ordered after the first hearing of the case when such an order could not be legally passed. By the amendment the case was taken out of the scope of Chapter XXXVII of the Code. This being so, there can be no doubt that the Judge had jurisdiction to hear the appeal preferred to him from the Munsif's decree. The first ground of the appeal is, therefore, disallowed. There can be no doubt, we think, that the arbitrators exceeded the powers given to them by the agreement of the parties, dated 18th May, 1879, and that their award determined matters not referred to arbitration. S. 526 of the Code enacts that "if no such ground as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the Court shall order it to be filed." In this case one of the grounds mentioned in s. 520 (a) was shown against the award, and the lower appellate Court was, therefore, in our opinion, justified in dismissing the plaintiffs' claim that the award should be filed. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

CIVIL JURISDICTION.

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March 7.

Before Mr. Justice Oldfield and Mr. Justice Straight.

DEBI DIAL SINGH AND OTHERS (PLAINTIFFS) v. AJAIB SINGH AND OTHERS
(DEFENDANTS).

*Act X of 1877 (Civil Procedure Code), s. 43—Relinquishment of part of claim—
Mesne profits.*

The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June, 1879, the defendants had wrongfully taken such fruit. *Held* that, as the cause of action, i. e., the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne profits in the first suit, the second suit was barred by the provisions of s. 43 of Act X of 1877.

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THIS was a reference to the High Court by Mirza Abid Ali Beg, Judge of the Court of Small Causes at Jaunpur. The plaintiffs in the suit which gave rise to this reference sued the defendants for Rs. 15, the value of the fruit upon certain mango trees, which they alleged the defendants had wrongfully taken on the 19th June, 1879. The plaintiffs had previously sued the defendants in the Court of the Munsif of Jaunpur for possession of the land upon which such trees stood and for such trees, stating in that suit, in respect to such trees, that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The defendants set up as a defence to the present suit that the cause of action in respect of the plaintiffs' claim for possession of such trees and for the value of the fruit thereof was one and the same, and that, as the plaintiffs had omitted in the former suit to claim the value of the fruit of such trees, they could not do so in the present suit, regard being had to the provisions of s. 43 of Act X of 1877. The opinion of the Small Cause Court Judge on the question raised by this defence was that, inasmuch as the taking of the fruit upon such trees was the dispossession of which the plaintiffs had complained in the former suit, the causes of action in the former and present suits were one and the same, and the present suit was barred by the provisions of s. 43 of Act X of 1877, by reason that the plaintiffs had omitted in the former suit to claim the value of the fruit they now claimed. Entertaining, however, some doubt on the question the Judge referred it to the High Court for decision.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the plaintiffs.

The defendants did not appear.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—We are of opinion that the view of the Small Cause Court Judge is correct, and that, the plaintiffs not having sued for the value of the mango fruits, as mesne profits, in the former suit, their present claim is barred by the provisions of s. 43 of the Civil Procedure Code. The cause of action, i.e., the plucking of the fruits on the 19th June, 1879, was in both cases

identical, and it cannot be permitted that the defendants should be subjected to a second litigation, when their whole liability could have been disposed of in the first suit. Our answer to this reference, therefore, is that the Small Cause Court Judge is right in holding the plaintiffs' claim to be barred.

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FULL BENCH.

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March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA v. MUHAMMAD JAFIR AND OTHERS.

Security for keeping the peace—High Court's powers of revision—Defect in form of summonses not prejudicing persons required to show cause—Act X of 1872 (Criminal Procedure Code), ss. 297, 491, 492.

Certain persons were convicted by a Magistrate of the first class of assault, an offence punishable under s. 352 of Act X of 1877. The case was brought to the knowledge of the High Court by the complainant preferring a petition to it, together with a copy of the Magistrate's order. This petition was laid before Straight, J., who, observing that the case was one in which the Magistrate should have taken security from such persons for keeping the peace, as provided by s. 489 of Act of 1872, directed the Magistrate to summon such persons to show cause why they should not be required, under s. 491 of that Act, to enter into a bond to keep the peace. The Magistrate accordingly summoned such persons as directed, the summonses setting forth that they were issued "under the orders of the High Court." The Magistrate took evidence on behalf of such persons, and eventually made an order requiring such persons to enter into a bond to keep the peace. Such persons were fully aware of the order made by Straight, J. Such persons applied to the High Court to set aside the order requiring them to enter into a bond to keep the peace, on the ground that the Magistrate had not proceeded of his own motion, but under the order of Straight, J., which was made without jurisdiction, and on the ground that the summonses had not set forth the report or information on which they were issued.

Held by STUART, C. J., that, inasmuch as Straight, J., when he made his order, represented the full authority and jurisdiction of the High Court, such order was final, and the application could not be entertained.

Held by PEARSON, J., SPANKIE, J., and OLDFIELD, J., (SPANIE, J., doubting whether such order could be questioned) that the order of Straight, J., was one which he was competent to make as a Court of Revision under s. 297 of Act X of 1872.

Held by PEARSON, J., and SPANKIE, J., that, inasmuch as such persons had not been in the slightest degree prejudiced by the defect in the summonses which were

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issued to them, such defect was not a ground on which to set aside the Magistrate's order requiring them to enter into a bond to keep the peace.

THREE persons, named Muhammad Jafir, Akbar, and Ghisu, were, on the 20th February, 1880, convicted by Sayyid Ali Hasan, exercising the powers of a first class Magistrate in Jaunpur, of wrongfully restraining and assaulting one Lalman, offences punishable under ss. 341 and 352 of the Indian Penal Code respectively, and were punished with fines. Lalman subsequently preferred a petition to the High Court, together with a copy of the Magistrate's order, such petition being apparently directed against the sentences inflicted by the Magistrate. On the 16th July, 1880, Straight, J., made the following order on such petition, in the exercise of the revisional powers of the High Court:—

STRAIGHT, J.—It seems to me that this is just one of the cases in which the Magistrate should, in addition to the punishment he inflicted in the way of fine, have required the defendants to find securities for the peace, as provided by s. 489 of the Criminal Procedure Code. Whatever the fault of the complainant, he has been subjected to a very gross indignity, and the Magistrate himself says that it was done intentionally, and would seem to convey by his remarks that it is likely to be repeated. I, therefore, direct him, having regard to all the circumstances and the convictions under s. 352 of the Indian Penal Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required, under s. 491 of the Criminal Procedure Code, to enter into a bond to keep the peace, with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine.

The Magistrate accordingly summoned Muhammad Jafir, Akbar, and Ghisu to show cause why they should not be required to enter into a bond to keep the peace, and, on their failing to show cause, by an order dated the 26th August, 1880, bound them over in their own recognizances to keep the peace for eight months. They applied to the High Court for the revision, under s. 297 of Act X of 1872, of this order, on the ground that the Magistrate had not proceeded *suo motu*, but had proceeded in obedience to the order of Straight, J., which was made without jurisdiction, and under

these circumstances the order of the Magistrate was contrary to law and should be quashed; and that, as the summons did not contain the particulars or information required by s. 492 of Act X of 1872, it was irregular, and the order of the Magistrate should be quashed. This application came before Pearson, J., who, as it called in question the legality of the order passed by Straight, J., directed that the application should be laid before a Full Bench for disposal.

Mr. Dillon and Mr. Amir-ud-din, for the petitioners.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

The following judgments were delivered by the Full Bench :

STUART, C.J.—I expressed the opinion at the hearing, and I am very clear, that we have no power to entertain this application. Mr. Justice Straight when he made the order of the 16th July last represented the full authority and jurisdiction of the Court and his order is final. Mr. Justice Straight, if he had any doubt on the subject, might have himself, or on the application of the parties, or either of them, referred the question to the Full Bench, but this proceeding not having been resorted to, and the case having left his hands on the order which he made, that order is final and cannot be revised. I may at the same time perhaps be permitted to observe that the learned Judge exercised a sound discretion in passing it. The present application must, therefore, be dismissed. (The remainder of the judgment of the learned Chief Justice is not material for the purposes of this report.)

PEARSON, J.—Mr. Justice Straight's order of the 16th July last directed the Magistrate to summon the petitioners to show cause why they should not be required to enter into a bond to keep the peace with or without sureties. That order was apparently passed under s. 297 of Act X of 1872, which provides that "in any case either called for by itself, or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." The proceeding which was brought

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under the High Court's notice by Lalman's petition of the 8th July last was the judgment of the Deputy Magistrate of Jaunpur, dated the 20th February last ; and the fault found with it was that, "in addition to the punishment he inflicted on the present petitioners by way of fine, he had not required them to find securities for the peace as provided by s. 489 of the Criminal Procedure Code." Whether the omission of the Deputy Magistrate, in the exercise of his discretion, to take action under s. 489 of Act X of 1872, after convicting the petitioners under s. 352, Indian Penal Code, was a material error in his proceeding is a question which may, I think, reasonably be answered in the affirmative. It was an error analogous to that of passing an inadequate sentence. Mr. Justice Straight was, therefore, competent to pass any order which appeared to him to be fit. By the order which he passed the Deputy Magistrate's attention was called to "the circumstances and the convictions under s. 352," and he was directed to exercise his discretion after proceeding under s. 491 of Act X of 1872. I cannot hold that he contravened the law in complying with the order which required him to perform his duty. There is not any reason to believe that the petitioners were in the slightest degree prejudiced by the defect in the summons to which the second paragraph of the application of the 10th September last refers. The complaint is that the substance of the report or information on which the summons was issued was not set forth therein. All that was stated was that it was issued under the orders of the High Court. The Deputy Magistrate has dealt with this complaint in his proceeding of the 26th August last, and shown that the petitioners must have been perfectly aware of the reasons for proposing to bind them over to keep the peace. I would dismiss the application.

SPANKIE, J. — Sayyid Ali Hasan, Deputy Magistrate of Jaunpur, on the 20th February of the present year convicted Muhammad Jafir, Akbar, and Ghisu, Muhammadans, under ss. 341 and 352, Indian Penal Code, holding it established by the evidence that they had gone to the field of the complainant, a Brahman, and there had caused him wrongful restraint, and had used criminal force against him. There had been, the Deputy Magistrate states, a bitter enmity between the parties, as shown by many records of criminal and

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revenue cases. The defendants, belonging to an influential community and possessed of wealth, did not suffer from this litigation, but the Brahman complainant was ruined. He had lost the greater portion of his occupancy-lands, and being a person of bad temper little sympathy was felt for him. On the 6th November, 1879, he had taken two ploughs to his field, and was preparing land for barley and peas. The three defendants went to the field, seized him, and with the aid of some other persons are said to have put a rope with some bones round his neck, and Jafir is said to have spat in his face. Their object was to pollute the Brahman, and so compel him to leave the village. The Deputy Magistrate was not satisfied that the accused Jafir had spat in the complainant's face, or that the accused had put a rope and bones round his neck, but he found that there had been wrongful restraint and assault. He, therefore, convicted the accused as above stated under ss. 341 and 352. The complainant petitioned this Court, urging that he had been spat upon, and a necklace of bones had been placed round his neck: he had been disgraced and polluted, being a Brahman, and he prayed for justice. One of the learned Judges of this Court remarked that the case "was just one of the cases in which the Magistrate should, in addition to the punishment he inflicted in the way of fine, have required the defendants to find securities for the peace, as provided by s. 489 of the Criminal Procedure Code. Whatever the fault of the complainant, he had been subjected to a very gross indignity, and the Magistrate himself says that it was intentionally done, and would seem to convey by his remarks that it is likely to be repeated. I, therefore, direct him, having regard to all the circumstances and the convictions under s. 352, Indian Penal Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required to enter into a bond to keep the peace, with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine." On receipt of this Court's proceeding, the Deputy Magistrate issued a summons calling upon the convicted persons to show cause why they should not be bound to keep the peace for the space of eight months. He took evidence on their part as to their respectability, their position as bankers, and the bad character of the complainant, to which, however, he does not appear to have

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attached much weight. But it had been urged before him that the summons did not set forth the substance of complaint against the accused, and, therefore, the proceedings under s. 491 were illegal. The Deputy Magistrate thus deals with the objection: "I do not think that there is force in the argument, because it is clear that proceedings have been taken under exceptional circumstances, and the accused have had ample opportunities of knowing that their presence in the Court was required for a particular object: they had also been at the High Court to witness how the case was being disposed of, that is to say, they were fully aware of the order that the High Court had passed in the case, and, I think, it was quite enough to say in the summons that they were required to be bound in their own recognizances under orders from the High Court: I have stated in my former decision in the assault case the petition of the accused, and that of Lalman, and I am of opinion that the law does not require any more proof against the accused, and I may presume safely that there is reasonable apprehension of a breach of the peace on the part of Muhammad Jafir, Akbar, and Ghisu." The Deputy Magistrate then directs that the three persons should execute a bond in the prescribed form for eight months, or in default that they should suffer simple imprisonment for that period or for a shorter period, if they do not obey the order. From this order a petition was filed in this Court, and it was contended that the Magistrate did not proceed *suo motu* under s. 489 (probably s. 491 is meant) of the Criminal Procedure Code, but a summons was issued under the order of the High Court, which had no jurisdiction to give such order; the issue of a summons under such order was illegal; the summons did not contain the particulars required by s. 492 of the Criminal Procedure Code; the irregularity was material, and the order should be annulled. The learned Judge who entertained the petition records the following order: "As this application calls in question the legality of the order passed by Mr. Justice Straight on the 16th July last, I direct that it be laid before a Full Bench."

I have some doubts, and expressed them at the hearing of this reference, whether we are competent to question the legality of the order of this Court on the 16th July last. Perhaps, however,

we may indirectly express an opinion regarding it, in dealing with the application of Muhammad Jafir and others, which was admitted by the referring Judge, and has been sent to us for disposal. The Court in passing the order of the 16th July last must have been acting as a Court of Revision under s. 297 of Act X of 1872. The Judge does not appear to have had the record in the case before him (it perhaps would have been better if he had sent for it), but he had a copy of the Deputy Magistrate's finding. There had been an offence followed by conviction of the nature of those offences described in s. 489 of the Criminal Procedure Code. In such cases, when the Court or Magistrate by whom any person is convicted, or the Court or Magistrate by which or by whom the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace, such Court or Magistrate may direct that the person so convicted be required to execute a formal engagement for keeping the peace, for any term not exceeding one year, or three years if the order be passed by a Court of Session. The learned Judge having before him on the 16th July last the finding and sentence of the Deputy Magistrate in the case of assault was competent to deal with it as a Court of Revision, and it is clear that he considered that the Magistrate should have acted under the terms of s. 489 of the Criminal Procedure Code, already referred to. As the learned Judge on the 16th July was the Court by which the final order would be passed, after reversing the judgment of the Deputy Magistrate, it appears to me that he had full jurisdiction to direct, if he pleased, the Magistrate to exercise the powers vested in him by the section. But I would say more than this. If the Deputy Magistrate had not, in the Court's opinion, exercised a sound and reasonable discretion in omitting to require securities in addition to the order already passed in the case, the Court might properly regard the omission as a material error in a judicial proceeding, and this being so it was at liberty to pass such an order as it thought fit. Being also the Court making the final order, the Judge himself would have been at liberty to require the convicted persons to execute the formal engagement mentioned in the third paragraph of the section. Instead, however, of acting under the provisions of s. 489

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the learned Judge, taking the Deputy Magistrate to find that the acts of the three defendants had been intentionally done, and also that they were likely to be repeated, directed the Magistrate to proceed under s. 491, Criminal Procedure Code. Under the terms of that section the Magistrate must receive information that any person is likely to commit a breach of the peace or to do any act that may probably occasion a breach of the peace. The summons required by the section may be issued on any report or other information which appears credible and which the Magistrate believes. But he cannot bind over a person until he has adjudicated on evidence before him. Under this section no doubt the Magistrate of a Division of a District or a Magistrate of the first class is the officer to act. There is no reference in the section to any other Court, and though it is, I think, competent for this Court to direct or require that security may be taken under s. 489 under the circumstances referred to above, I am not so satisfied that it has the power to initiate by positive order proceedings under s. 491 of the Criminal Procedure Code. On the other hand I apprehend that this Court, having a case before it either as a Court of appeal or reference, would be justified in calling a Magistrate's attention to the probability of a breach of the peace between the parties, should any such danger appear from the proceedings before the Court to be imminent. For instance the Court in some cases might have acted of its own motion under s. 489, but did not do so, because some months, as in this case, had elapsed from the date of the conviction, and a proceeding under s. 489 should be simultaneous with the conviction, as the order made under the section is in addition to any other order passed in the case. But it might appear afterwards that a breach of the peace was imminent and some further and speedy action was desirable, as indeed it may have been in the case before us, in which the accused persons had been punished with a fine, or in default a week's confinement, and the parties were at large again with their natural ill-feelings still more intensified. In such a case, this Court would, I think, be at liberty to instruct the Magistrate to act under s. 491. The direction in Mr. Justice Straight's order was rather by way of instruction than a positive order requiring the parties to furnish security. The order directs the Magistrate, "having

regard to all the circumstances and the convictions under s. 352 of the Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required under s. 491 of the Criminal Procedure Code to enter into a bond to keep the peace with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine." Such a direction or instruction may be regarded as one mode of informing the Magistrate of the probability of a breach of the peace. The terms of the Explanation to s. 491 are very wide. The summons may issue "on any report or other information which appears credible, and which the Magistrate believes." What happened then in this case? The Magistrate reconsiders the former evidence and hears any evidence offered by the parties summoned, and comes to the conclusion that "there is reasonable apprehension of a breach of the peace," and he makes his own order in the way which seemed to himself to be necessary under the circumstances of the case and with reference to the position of the parties. Entertaining this view of the case, I am not prepared to say that the order of this Court, dated 16th July last, was illegal. In so far then as the application now contends that this order was illegal, and, therefore, all proceedings under it were illegal, I would answer that there was no illegality. Whether the Deputy Magistrate's subsequent procedure after the receipt of the Judge's remarks was regular or not is another matter. He should I consider have drawn out, on receipt of the Judge's direction, a proceeding in which he should have stated all the circumstances of the previous conviction, and his reasons for believing that a breach of the peace was likely. Next the substance of this information should have been set forth in the summons with the other particulars required by s. 492. Had this been done the Magistrate would have been acting in conformity with the provision of s. 492. He appears to have acted irregularly by omitting to say more than that the parties were required to be bound in their own recognizances "under orders from the High Court." Under certain circumstances it might have happened that the parties summoned would have been prejudiced by the omission to fulfil all the conditions of s. 492, and in such a case the Court would have felt bound to interfere. But we have the assurance and finding of the Deputy Magistrate in this case

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that "the accused had ample opportunities of knowing that their presence in the Court was required for a particular object: they had also been at the High Court to witness how the case was being disposed of by Mr. Justice Straight, *i. e.*, they were fully aware of the order that the High Court had passed in the case." On this finding I could not say that the petitioners had been prejudiced in their defence to the summons by the procedure of the Magistrate now made the subject of complaint. Moreover, their witnesses were examined. The nature of the proceedings under chapter XXXVII of the Code of Criminal Procedure is judicial. There must be an adjudication on evidence, and as the provisions of s. 283 are applicable to cases of revision as well as appeal I would say that the objections taken by Mr. Dillon for the petitioners fail. I observe that s. 489 is cited, probably by some accidental error, in the petition of the 10th September by Mr. Dillon. It is not really contended that the Magistrate had acted under s. 489; s. 491 is clearly meant. I would dismiss the application for the reasons given above.

OLDFIELD, J.—In my opinion, the application should be dismissed. The Magistrate's proceedings were taken under the direction of this Court acting within its power under s. 297 of the Code of Criminal Procedure. There is no force in the second ground of objection.

STRAIGHT, J.—Having regard to the circumstance that an order of my own is the subject of this reference for revision, I think it best to abstain from taking part in the judgment of the Full Bench.

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 March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

AZIM-UD-DIN (DEPENDANT) v. BALDEO (PLAINTIFF).*

Suit to have an execution-sale, which had been set aside, confirmed—Act X of 1877 (Civil Procedure Code), ss. 311, 312, 588—Finality of order setting aside sale.

Held (OLDFIELD, J., dissenting) that a suit by the purchaser at a sale of immovable property in execution of a decree, which has been set aside under ss. 311 and

* Appeal under s. 10 of the Letters Patent, No. 4 of 1880.

312 of Act X. of 1877, to have such sale confirmed, on the ground that there was no irregularity in the publication or conduct thereof, is not barred by the last clause of s. 312 or by the last clause of s. 588, but is maintainable.

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THIS was a suit to have an execution-sale, which had been set aside, maintained. Certain immoveable property was put up for sale in execution of a decree, and was purchased by the plaintiff in this suit, the son of the decree-holder. The judgment-debtor preferred objections to the sale on the ground that the sale had not taken place at the hour fixed; that consequently intending purchasers did not assemble, and only a few persons, who were dependents of the decree-holder, were present; and that consequently the property was sold for an inadequate price, and he was thereby materially injured. The Court executing the decree disallowed these objections. On appeal by the judgment-debtor the appellate Court set aside the sale on the ground that it was stated in the sale-notification that the sale would take place at 12 o'clock noon; that admittedly the sale took place at or after 2 P.M.; that the fact of the sale having taken place two hours or so after the time fixed was a material irregularity in its conduct; and that by reason of such irregularity the judgment-debtor had sustained substantial injury, the property having fetched an inadequate price. The plaintiff, the auction-purchaser, brought the present suit against the judgment-debtor to have the sale maintained, on the ground that there was no irregularity in its conduct; and therefore the order setting it aside was contrary to law. The defendant set up as a defence that the suit was not maintainable. Both the lower Courts held that a suit to have an execution-sale, which had been set aside, confirmed, on the ground that it had been improperly set aside, was maintainable; and that the order setting aside the sale in this case was not in accordance with the provisions of s. 312 of Act X of 1877, there having been no irregularity in the conduct of the sale, and, if there had been any such irregularity, the judgment-debtor had not sustained injury by reason thereof; and gave the plaintiff a decree. On second appeal by the defendant it was contended on his behalf that the order setting aside the sale was final, and no suit to set aside such an order could be maintained by the party affected thereby. The appeal came for hearing before Pearson, J., and Oldfield, J., who differed

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in opinion on the point whether the suit was maintainable. Those learned Judges delivered the following judgments :—

PEARSON, J.—The last clause of s. 312 of Act X of 1877 declares that “no suit to set aside, on the ground of irregularity, an order passed under this section shall be brought by the party against whom such order has been made.” The irregularity referred to is that spoken of in the preceding section, viz., a material irregularity in publishing or conducting a sale. The present suit is not a suit to set aside, on the ground of such irregularity, an order passed under s. 312, and is not, therefore, in my opinion, barred by the terms of the last clause thereof. The last clause of s. 588 of the same Act declares that “the orders passed in appeal under this section shall be final.” The chapter in which that section occurs treats of appeals from orders, and it appears to me to be the obvious meaning of the last clause above cited that the orders specified in the section shall be the subject of a single appeal only, and that the orders passed in appeal shall be final in the sense that they shall not be the subjects of a second appeal. The present suit is not, in my opinion, barred by the last clause of s. 588 of the Code. Accordingly, I would dismiss the appeal with costs.

OLDFIELD, J.—The plaintiff is auction-purchaser at an execution-sale. An application was preferred by the judgment-debtor under s. 311 of Act X of 1877, asking the Court to set aside the sale, on the ground of material irregularity in conducting the sale. The first Court disallowed the objection and confirmed the sale. On appeal the appellate Court allowed the objection and set aside the sale. The plaintiff, auction-purchaser, has brought this suit to have the sale maintained. It appears to me that the suit is not maintainable with reference to the last clause of s. 588 of Act X of 1877, which is as follows :—“The orders passed in appeal under this section shall be final.” I consider this clause does not refer to finality so far only that no second appeal is allowed, but to render the order final for all purposes and to preclude a suit. The old law of s. 257 of Act VIII of 1859 allowed neither appeal nor suit for an order setting aside a sale, and while allowing an appeal from an order confirming a sale allowed no suit. The words of this part of the section were :—“If the objection be allowed, the

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order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." The meaning of the term "final" under that law was fully discussed by the Full Bench of the Calcutta Court in *Kooldeep Narain Singh v. Luckhun Singh* (1). Peacock, C. J., remarked:—"If the objection be allowed, the order made to set aside the sale is final; that, as I understand it, means final for all purposes. This would cause no great hardship, for, if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale. But he could not be greatly injured, for when a sale is set aside the purchaser is entitled by s. 258 to receive back his purchase-money with or without interest." In s. 588 of Act X of 1877, the same words "the order shall be final" occur, and I can only suppose that they are used in the same sense that attached to them in the old law, which is their natural sense, final being final for all purposes. Had it been intended to allow a suit to contest the order, it is presumable that the Legislature would have given a specific direction to that effect, as it has in other parts of the Code (ss. 332, 335), for as Sir Barnes Peacock pointed out in the judgment cited Courts of Justice have, generally speaking, the sole control over the execution of their process. I would allow the appeal and reverse the decree of the lower Court and dismiss the suit with costs.

The defendant appealed to the Full Court from the judgment of Pearson, J., under s. 10 of the Letters Patent.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondent.

The following judgments were delivered by the Full Court:

STUART, C.J.—I agree with Mr. Justice Pearson. When Sir Barnes Peacock said, in the case referred to by Mr. Justice

(1) 9 W. R., 218; S. C., B. L. R., F. B. R., 917.

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Oldfield, that "if the objection be allowed the order made to set aside the sale is final, that is, as I understand it, final for all purposes," he must be understood to have meant "final for all purposes" *as an order*. If he meant anything more, and that a suit would not lie, he was in my opinion clearly wrong. The question before us to my mind does not admit of the least doubt or difficulty, and I would dismiss the appeal and affirm the judgment of the Division Bench with costs.

PEARSON, J.—I adhere to my judgment which is impugned by this appeal; and can only express my surprise that it should be impugned by an argument which is not seriously maintainable. The present suit not being one of the nature described in the last clause of s. 312 of Act X of 1877, its provision cannot apply to it. On the ground on which it is brought, the appeal manifestly fails. The contention that the suit was barred by the concluding clause of s. 588 of the Act was more plausible, as the authority of Sir Barnes Peacock supports the view that the word "final," as used in that clause, means final for all purposes and precludes not only a second appeal but a fresh suit. The word "final," as used in that clause, has doubtless the same meaning as the same word used in s. 257 of Act VIII of 1859, which Sir Barnes Peacock was construing in the judgment to which reference was made by my learned colleague Mr. Justice Oldfield, in disposing of the present case on the 8th June last, but such a construction of the word appears to be negatived by the concluding terms of s. 257 itself. Had the word "final" been used in such a sense in the preceding part of that section, it would have been unnecessary, it would have been mere surplusage and repetition, to add that the "party against whom the same (order) has been given shall be precluded from bringing a suit for establishing his claim."

SPANKIE, J.—The decree-holder, or any person whose immovable property has been sold under the chapter in which s. 311 is found, and no other person, under that section may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it. If no such application as is mentioned in s. 311 be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming

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the sale as regards the parties to the suit and the purchaser. If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale. But no suit to set aside, on the ground of such irregularity, an order passed under this section (312) shall be brought by the party against whom such order has been made. It appears then that the auction-purchaser cannot make an application under s. 311, but if an application is made by the decree-holder, or the person whose immoveable property has been sold under the chapter, and if the sale is confirmed, it is confirmed as regards the parties to the suit and the purchaser. It further appears that, if the sale be confirmed or be set aside, no suit can be brought on the ground of such irregularity to set aside an order passed under the section by the party against whom the order has been made. It would seem then that no auction purchaser, who brings a suit to maintain a sale on the ground that there was no material irregularity in publishing or conducting the same, can be said to be debarred from doing so by the concluding paragraph of s. 312, and this I propose presently to establish. But though an auction-purchaser cannot himself be the person who makes an application under s. 311, and though the sale may be confirmed as regards himself and the parties to the suit, he may claim to have notice served upon him and to be made a party, when an application has been made to cancel a sale on the ground of irregularity. There is an appeal allowed by cl. (16), s. 588, from an order confirming the sale, though there is none from an order setting aside the sale. The auction-purchaser may claim, if he has been heard when the application was disposed of, to be a respondent in the appeal, as he is interested in maintaining the confirmation of the sale. The orders passed in appeal under s. 312 are final, so far that no further appeal is permitted from the order made. In another sense the order may be said to be final, and that is in respect of the application under s. 311. For the applicant under that section comes into Court for the sole purpose of setting aside the sale on the ground of material irregularity. Such a suit, however, has already been barred by s. 312, and it is not easy to understand that it was intended by the closing words of s. 588 to repeat the prohibition. If the sale be confirmed, and the decree-holder and judgment-debtor are agreed, there is no object in the alleged

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finality of s. 588 for all purposes. In so far as the auction-purchaser is concerned, he cannot be an applicant under s. 311, and if brought into the proceeding as a party, it is that he may defend his purchase. If the sale be confirmed, he has no motive or ground to maintain it. He equally with the decree-holder and judgment-debtor is precluded by s. 312 from a suit to set aside by a regular suit, on the ground of material irregularity, a sale confirmed by the order of a Court executing a decree. The decision to which my honourable colleague Mr. Justice Oldfield refers was passed on a question whether or not there was a special appeal from an order passed in appeal under s. 257 of Act VIII of 1859. No doubt the learned Chief Justice intimated his opinion that the order to set aside a sale is final for all purposes. But the wording of s. 257 of Act VIII of 1859 and the wording of s. 312 of Act X of 1877 are not identical. In the one Act, the passage runs as follows :—" If the objection be allowed, the order made to set aside the sale shall be final ; if the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been made shall be precluded from bringing a suit to establish his claim." The result of this was that a party desirous of bringing a suit to confirm a sale, in consequence of an order in appeal setting it aside, was strictly precluded from doing so by the words of the section. No suit could be brought by the party against whom an order was passed to establish his claim whatever it might be, and in the case of an auction-purchaser it would be a claim to maintain the sale in his favour on the ground that there had been no material irregularity in publishing or conducting it. But the words of s. 312 are different :—" If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale." It is not said, as it was in s. 257 of Act VIII of 1859, that "if the objection be allowed, the order made to set aside the sale shall be final." But it is added that "no suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made." As we have seen, there is only an appeal from an order confirming the sale. If the appeal be disallowed, it is dismissed and the sale confirmed. If the appeal be decreed, the

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sale is set aside upon the ground that there was a material irregularity in the publishing or conducting it. From this order there is no appeal, but an order by the Court executing the decree and setting aside the sale on this ground has not been declared final by s. 312. Thus there is nothing to preclude a person from coming into Court to confirm a sale on the ground that there was no irregularity, though not to sue to set aside an order of confirmation, passed in appeal, on the ground that there was material irregularity in the publishing or conducting the sale. Any claim in a suit was barred by s. 257 of Act VIII of 1859. The suit to set aside a sale, when confirmed, on the ground of material irregularity in publishing and conducting it alone is barred by s. 312. Under the old Act the order passed had the effect of a decree because all recourse to a regular suit was barred. Under the new Act the order has the effect of a decree in so far only as the prohibition to sue is limited. But in respect of any other claim not so limited the order under s. 312 has not the effect of a *decree* as defined now by s. 2 of the Code, which expressly declares that an order under s. 588 is *not* a decree. Thus though an order under s. 588 is not open to further appeal, and is so far final, it is not final for all purposes, as it is not a decree in respect of the matter now complained of. For these reasons I would support Mr. Justice Pearson's judgment.

OLDFIELD, J.—I have little to add to the remarks in my judgment dated 8th June last. The last paragraph of s. 588, Civil Procedure Code, to the effect that "the orders passed in appeal under this section shall be final" appears to me to bar a suit, the word "final" meaning final for all purposes. Under any circumstances I should hesitate to hold that a suit is maintainable by an auction-purchaser to have a sale confirmed which has been set aside by the Court executing the decree, for irregularities in publishing or conducting the sale, under s. 312, Civil Procedure Code, unless it could be shown that the law expressly allows such a suit. Civil Courts have jurisdiction to try all suits of a civil nature, but this jurisdiction is by s. 11, Civil Procedure Code, made subject to the provisions of the Code, one of which is that the Court to which the decree is sent for execution shall alone execute the decree (s. 223); and it

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would be an interference with the execution of the decree to allow an auction-purchaser to bring a suit to contest the order of the Court executing the decree for setting aside or refusing to confirm a sale, when the order is made under the provisions of ss. 311, 312, Civil Procedure Code. The observations of the Chief Justice, Sir Barnes Peacock, in *Kooldeep Narain Singh v. Luckhun Singh* (1), referring to s. 257 of Act VIII of 1859, appear to me so pertinent that I give them at length :—"S. 257 relates to applications for setting aside a sale under an execution, on the ground of some material irregularity in publishing or conducting the sale. Generally speaking, Courts of Justice have the sole control over the execution of their own process, and if any irregularity is committed in the execution of their process, and the Court upholds what has been done under the execution, no action can be brought in another Court to upset, on the ground of an irregularity, that which the Court itself, out of which the execution issued, has upheld. But in this country the Legislature appears to have thought it unsafe to leave the question as to whether there has been an irregularity in publishing or conducting a sale under an execution, to the final decision of the Court out of which the execution issued ; and consequently an appeal was allowed from the decision of the Court. That was going one step beyond the ordinary course with reference to mere irregularities. Probably, the Legislature thought that there were already very considerable difficulties in an execution-creditor's obtaining the fruits of his judgment ; that no very difficult point of law was likely to arise in deciding whether there was an irregularity in publishing or conducting a sale ; and therefore that justice would be sufficiently protected by giving one regular appeal in such a case upon any question of fact or law. If the objection be allowed, the order made to set aside the sale is final ; that, as I understand it, means final for all purposes. This would cause no great hardship : for if the objections were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale. But he could not be greatly injured ; for when a sale is set aside, the purchaser is entitled by s. 258 to receive back his purchase-money with or without interest." S. 315 of the present Civil Procedure Code seems to me to point out

(1) 9 W. B., 218 ; S. C., B. L. R., F. B. R., 917.

the only remedy which it was intended to give to the auction-purchaser, that is, to recover the purchase-money with or without interest. By s. 312 no suit will lie to set aside, on the ground of irregularity in publishing or conducting, a sale which has been confirmed under s. 312, and it seems unreasonable to suppose that it was intended that a suit should lie on the part of the auction-purchaser to confirm a sale which has been set aside on the ground of irregularity in publishing or conducting it. I would make the same order that I formerly proposed, for dismissing the suit with costs.

STRAIGHT, J.—I entirely concur in the views expressed by my honorable colleague Mr. Justice Pearson, and agree with him that this suit is properly maintainable. The appeal should be dismissed with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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March 10.

EMPRESS OF INDIA v. ANAND SARUP AND OTHERS.

Transfer of Magistrate while trying a case—Jurisdiction to complete Trial.

Mr. M was appointed by the Local Government, under s. 37 of Act X of 1872, a Magistrate of the first class, under the designation of Joint Magistrate, in the district of Meerut. He was subsequently appointed to officiate as Magistrate of the district of Meerut during the absence of Mr. F or until further orders. While so officiating he was appointed by a Government Notification dated the 10th July, 1880, to officiate as Magistrate and Collector of Gorakhpur "on being relieved by Mr. F." He was relieved by Mr. F in the forenoon of the 23rd July, 1880; and in the afternoon of that day, under the verbal order of Mr. F, he proceeded to complete a criminal case which he had commenced to try while officiating as Magistrate of the district of Meerut. All the evidence in this case had been recorded, and it only remained to pass judgment. Mr. M accordingly passed judgment in this case, and sentenced the accused persons to various terms of imprisonment. *Held* (SPANKIE, J., dissenting) that Mr. M retained his jurisdiction in the district of Meerut so long as he stood appointed by the Government to that district and no longer, and the effect of the order of the 10th July, 1880, was to transfer him from the district of Meerut from the moment he was relieved by Mr. F of the office of Magistrate of that district, and from that moment he no longer stood appointed to that district and could exercise no jurisdiction therein as Magistrate of the first class; and that therefore the convictions of such accused persons had been properly quashed on the ground that Mr. M had no jurisdiction.

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THIS was a case called for by the High Court at the instance of the Local Government. It appeared that on the 21st July, 1880, Mr. H. P. Mulock, a Magistrate of the first class, the then Officiating Magistrate of the Meerut District, began a magisterial inquiry into an offence alleged to have been committed by one Anand Sarup and certain other persons. Some further evidence was taken on the 22nd July, and on the 23rd Mr. Mulock made over charge of the Meerut District to Mr. Fisher, having by Government Notification No. 2150, dated the 10th July, 1880, been gazetted to officiate as Magistrate and Collector of Gorakhpur when relieved by Mr. Fisher. The exact words of that Notification were as follows: "Mr. Mulock, Officiating Magistrate and Collector of Meerut, to officiate as Magistrate and Collector of Gorakhpur, on being relieved by Mr. Fisher." After making over charge, Mr. Mulock, by Mr. Fisher's verbal order, proceeded to complete the cases which he had previously been trying as Magistrate and Collector. Among these was the case of Anand Sarup, in which all the evidence had been recorded, and it only remained to pass judgment, which Mr. Mulock accordingly did, and on the afternoon of the 23rd July sentenced the accused persons to various terms of imprisonment. The accused persons appealed to the Sessions Judge of Meerut, Mr. H. G. Keene, who quashed the convictions on the ground that Mr. Mulock, having made over charge of the Meerut District to Mr. Fisher, had no jurisdiction in that District. In bringing the case to the notice of the High Court and requesting that it would call for the record of the case and pass suitable orders thereon, the Local Government expressed its opinion that the order of the Sessions Judge was opposed to the spirit of the Criminal Procedure Code, and that Mr. Mulock, though gazetted to officiate as Magistrate of Gorakhpur, still retained his powers as a Magistrate of the first class in the district in which he was working for the time being. The High Court having called for the record of the case, the case was laid before Stuart, C. J., and Straight, J., who referred it to the Full Court.

Messrs. Colvin and Hill, for the accused.

Mr. Ross and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

The following judgments were delivered by the Full Court :—

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OLDFIELD, J., (PEARSON, J., and STRAIGHT, J., concurring).—The Local Government has authority under s. 37, Criminal Procedure Code, to appoint as many other persons besides the Magistrate of the District, as it thinks fit, to be Magistrates of the first, second or third classes in the District. Mr. Mulock was in this way appointed a Magistrate of the first class, under the designation of Joint Magistrate, in the District of Meerut. He was subsequently appointed to officiate as Magistrate of the District of Meerut during the absence of Mr. Fisher or until further orders, and by Government Notification dated 10th July, 1880, No. 2150, he was appointed to officiate as Magistrate of Gorakhpur. The Notification is as follows :—"Mr. Mulock, Officiating Magistrate and Collector of Meerut, to officiate as Magistrate and Collector of Gorakhpur, on being relieved by Mr. Fisher." He was relieved by Mr. Fisher of the office of Magistrate of Meerut on the forenoon of the 23rd July, 1880. Mr. Mulock retained his jurisdiction in the District of Meerut so long as he stood appointed by the Government to that District as a first class Magistrate but no longer, and it seems to us that the effect of the order of the 10th July was to transfer him from the Meerut District from the moment he was relieved of the office of Magistrate, and from that moment he no longer stood appointed to the Meerut District and could exercise no jurisdiction in it as a first class Magistrate. The language of the order is plain enough; Mr. Mulock is directed to officiate as Magistrate of Gorakhpur on being relieved by Mr. Fisher; the order does not direct that he shall revert to the post of Joint Magistrate or continue to remain appointed in any capacity to the District of Meerut. The order appears to us to have contemplated Mr. Mulock's immediate transfer from the District of Meerut on being relieved of the office of Magistrate by Mr. Fisher, and the severance of his connection with the Meerut District. The Judge's view therefore that Mr. Mulock had no jurisdiction appears to us to be right.

STUART, C. J.—I am entirely of the same opinion, and am glad to observe that the Judge took a correct view of the question of jurisdiction. But I do not think he exercised a sound discretion

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in ordering the discharge of the accused. There was clearly a case for inquiry on the merits, and instead of ordering the accused to be discharged he should have directed them to be detained for a new trial before the proper officer. I may add that the suggestion of the Government that the Judge's order was opposed to the spirit of the Criminal Procedure Code appears to have been based upon a misconception of Mr. Mulock's position on being relieved by Mr. Fisher. The law on the subject, including the Government's own Notifications, is too clear, in spirit as well as in letter, to admit of the least doubt on the subject.

SPANKIE, J.—Mr. Mulock made over to Mr. Fisher the office of Magistrate of the District of Meerut. He himself had been officiating in that capacity. But he appeared to have been what is called the Joint Magistrate of that District. In reality he was a Magistrate of the first class in the Meerut District, and when he made over the office of Magistrate of the District he did not, I think, necessarily surrender his powers as a Magistrate of the first class in that District. It is true that he had been nominated to officiate as Magistrate and Collector of Gorakhpur, but it is a mistake to assume that he had jurisdiction there before he had reached the place and had taken charge of the office. The substantive pay of an Officiating Magistrate of a District who has not yet become a full Magistrate of a District is what he draws as a Magistrate of the first class, and until he leaves the District in which he was attached as a Joint Magistrate of the first class, I cannot perceive that he may not exercise the powers that belong to that office. There is no such Court as that of the Magistrate of the District. Magistrates are either Magistrates of the first class or of the second, or of the third class, and in every District there shall be, according to s. 35, Criminal Procedure Code, a Magistrate of the first class, who shall be called the Magistrate of the District, and he shall exercise throughout his district all the powers of a Magistrate. But when he calls up a case he does so with the powers of a Magistrate of the first class, and when Mr. Mulock ceased to be called the Magistrate of the District of Meerut, he nevertheless retained, as long as he remained there, by order of the Magistrate of the District, his powers as a first class Magis-

trate, and it was only right and for the good of the public service that he should complete his work. The accused cannot be said to have been prejudiced, and indeed in the memorandum of appeal the objection as to the want of jurisdiction was not taken. It is quite according to the spirit of the Act that each Magistrate should pass sentence on proceedings recorded by himself, as appears from the proviso to s. 323 of the Code.

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APPELLATE CIVIL.

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March 8.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AJUDHIA NATH AND OTHERS (DEFENDANTS) v. SITAL (PLAINTIFF).*

Landholder and Tenant—Hypothecation of trees.

A tenant with a right of occupancy can only make a valid hypothecation of the trees on the land he holds for the term of his tenancy; with his ejectment from such land and the cessation of his tenancy such an hypothecation ceases to be enforceable (1).

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the appellants.

Babu Sital Prasad Chattarji, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The plaintiff holds a bond dated the 15th October, 1874, executed by Alopi, defendant, by which he hypothecated to him certain trees growing in a garden in his occupancy as a right-of-occupancy tenant and a dwelling-house. The appellants before us represent Alopi's landlord, who held Revenue Court decrees against Alopi for rent and ejected him from his holding; and, putting up to sale his rights in the holding, became its purchaser. The object of this suit is to enforce against the appel-

*Second Appeal, No. 1031 of 1880, from a decree of Kai Makhan Lal, Subordinate Judge of Allahabad, dated the 3rd July, 1880, affirming a decree of Babu Pramoda Charan Banarji, Munsif of Allahabad, dated the 8th March, 1880.

(1) See also *Ram Baran Ram v. Salig Ram Singh*, I. L. R., 2 All. 896.

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lants the charge under the bond. The Courts below have decreed the claim. The third plea in the memorandum of appeal in respect of the enforcement of the charge against the house has been withdrawn; but the first plea in respect of its enforcement against the trees in Alopi's former holding is in our opinion valid. Looking to the tenure of a right-of-occupancy tenant, Alopi could only make a valid hypothecation of the trees on the land he held for the term of his tenancy. With his ejectment from the land and cessation of his tenancy, the hypothecation ceased to be enforceable. We modify the decree of the lower Courts, and decree the claim against Alopi and for enforcement of the charge against the house. Each party will pay their own costs. .

Decree modified.

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March 18.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

RAGHU NATH DAS AND ANOTHER (DEFENDANTS) v. KAKKAN MAL AND ANOTHER (PLAINTIFFS).*

Suit for money secured by the mortgage of immoveable property situate partly in the Family Domains of the Maharaja of Benares—Act VIII of 1859 (Civil Procedure Code), s. 13—Sale in execution—Fraudulent representation by decree-holder—Suit to set aside sale—Sale of decree enforcing hypothecation of immoveable property.

A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the District of Benares and of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property; and he was authorized to proceed with it, under the provisions of s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue. He accordingly proceeded with the suit and on the 18th November, 1874, gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the Family Domains of the Maharaja of Benares to sale, this decree was sent for execution to the Subordinate Judge at Kondh, within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September, 1877. Subsequently the defendants in the present suit, who held decrees for money against H, one of the plaintiffs in the suit above-mentioned, applied to the Subordinate Judge of Benares for the attachment and sale of H's interest in the decree above-mentioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September, 1877, had been set aside. Such interest was accordingly put up for sale on the 29th

* First Appeal, No. 35 of 1880, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 6th December, 1879.

May, 1878, at Benares, by the Subordinate Judge of Benares, and was purchased by the plaintiffs in the present suit, who were induced to purchase by such false representation. The plaintiffs in the present suit claimed the avoidance of the sale of the 29th May, 1878, and the refund of the purchase money on the ground that they were induced to purchase by such false representation, and on the ground that the sale of the interest of *H* in the decree of the 18th November, 1874, being of the nature of immovable property situate within the limits of the Family Domains of the Maharaja of Benares, could not legally be sold at Benares by the Benares Court. *Held* that such false representation must be held to constitute in law such fraud as vitiated the sale of the 29th May, 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immovable property situate within the Family Domains of the Maharaja of Benares. Also that [following S. A. No. 969 of 1877, decided the 14th December, 1877 (1)] the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immovable property was situate within the limits of the Family Domains of the Maharaja of Benares, those Domains not constituting a district within the meaning of that section.

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THE plaintiffs in this suit, the purchasers at an execution-sale, claimed the cancelment thereof, and a refund of the purchase-money. It appeared that on the 29th November, 1873, one Harish Chandar and his brother Gokal Chandar sued a certain person in the Court of the Subordinate Judge of Benares upon a bond in which, among others property, certain property situate in the Family Domains of the Maharaja of Benares was hypothecated. The Subordinate Judge was not competent to entertain this suit, so far as it related to such property; but he was authorized to proceed with it, under the provisions of s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue, under whose chief control the Family Domains of the Maharaja of Benares are. On the 18th November, 1874, the Subordinate Judge gave Harish Chandar and Gokal Chandar a decree for the amount of the bond-debt which directed the sale of such property in satisfaction thereof. The decree-holders procured a certificate under the provisions of s. 285 of Act VIII of 1859, with the view of bringing such property to sale by the Court within whose jurisdiction it was situated. Such property was eventually put up for sale on the 29th August and the 4th September, 1877. In the meantime the defendants in the present suit, who in 1875 had obtained in the Court of the Subordinate Judge of Benares decrees for money against Harish Chandar, caused his interest in the decree of the 18th Nov-

(1) Unreported.

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ember, 1874, to be attached and advertized for sale. The sale did not take place, as Harish Chandar objected that the decree was in the nature of immoveable property, and his interest therein could only be sold by the Court within whose jurisdiction the property thereby directed to be sold was situate; but Gokal Chandar was appointed manager of such property for the realization of the amount of the decree which, as stated above, had been put in execution by the Court within whose jurisdiction such property was situate. On the 22nd March, 1878, the defendants in the present suit preferred applications to the Subordinate Judge of Benares in which they represented that the sales of the 29th August and the 4th September, 1877, had been set aside, and prayed that Harish Chandar's interest in the decree of the 18th November, 1874, might be again notified for sale in execution of their decrees. Such interest was accordingly put up for sale in the Subordinate Judge's Court on the 29th May, 1878, and was purchased by the plaintiffs for Rs. 8,000. When the plaintiffs became aware that the sales in execution of that decree of the 29th August and the 4th September, 1877, had not been set aside, they endeavoured to obtain the cancellation of the sale of the 29th May, 1878. Failing in this endeavour, they brought the present suit against the defendants for the cancellation of that sale, and a refund of the purchase-money, on the ground that the defendants had induced them to purchase by falsely representing that the previous sales had been set aside; and on the ground that the decree of the 18th November, 1874, should have been put up for sale by the Court within whose jurisdiction the property thereby directed to be sold was situate, and such property being situated in the Family Domains of the Maharaja of Benares, the Subordinate Judge of Benares had not jurisdiction to bring Harish Chandar's interest in such decree to sale. The defendants contended, *inter alia*, that the misrepresentations which they had made concerning the sales of the 29th August and the 4th September, 1877, had not been made knowingly, and could not have the effect of avoiding the sale which the plaintiffs sought to cancel; and that there was no irregularity in such sale. The Court of first instance held that, although such misrepresentations might not have been made knowingly, yet they were not made in good faith, i.e., with due care and attention, and they therefore were fraudulent, and

had the effect of vitiating the sale: and that, inasmuch as the decree of the 18th November, 1874, was of the nature of immovable property situate in the Family Domains of the Maharaja of Benares, the Subordinate Judge of Benares was not competent to bring it to sale, and the sale thereof was void; and it gave the plaintiffs a decree. Two of the defendants appealed to the High Court.

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The *Senior Government Pleader* (Lala Juala Prasad), for the appellants.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), Pandit Ajudhia Nath, and Munshis Sukh Ram and Kashi Prasad, for the respondents.

The judgment of the Court (STUART, C. J., and PEARSON, J.,) was delivered by

PEARSON, J.—In a suit instituted by Harish Chandar and his brother Gokal Chandar in the Court of the Subordinate Judge of Benares, on the basis of a deed of mortgage, a decree was passed in their favour on the 18th November, 1874, for the recovery of Rs. 41,932-10-0 from the mortgagor, Phuljhari Kuar, and from the mortgaged property, consisting of the muafi mahal of taluqa Karona and its appurtenances which is situated in Gangapur within the domains of the Maharaja of Benares and a garden situated in the district of Benares. In execution thereof the decree-holders first caused the latter piece of property to be sold by the Court which passed the decree; and then procured a certificate under the provisions of the 285th and following sections of Act VIII of 1859, with the view of bringing to sale the property situated within the Maharaja's domains by the Court of the Subordinate Judge at Kondh within whose jurisdiction it is situated. After some delay it was sold on the 29th August and 4th September, 1877, and the sale was confirmed on the 3rd October, 1877; and was not set aside on appeal. Meanwhile four of the five defendants in the present suit, who held decrees against Harish Chandar given to them by the Court at Benares, applied to that Court to sell in execution thereof their judgment-debtor's interest in the decree of 18th November, 1874. The application was not

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allowed, but Gokal Chandar was on the 26th July, 1875, appointed under s. 243 of Act VIII of 1859, to be manager of the mortgaged property in the Maharaja's domains for the realization of the decree of 1874 which was put in execution in the Court at Kondh. Again in 1877 application was made to the Court at Benares by the first four defendants, for the sale of their judgment-debtor's interest in the decree of 1874, and they alleged that the sales of the 29th August and 4th September, 1877, had been set aside. It was accordingly sold by auction on the 29th May, 1878, and purchased by the plaintiffs for Rs. 8,000. The present suit is brought by them for the avoidance of the sale on two grounds: first that they were induced to make the purchase by the false representation that the former auction-sales of 29th August and 4th September, 1877, had been set aside, and secondly that the sale of Harish Chandar's interest in the decree of 18th November, 1874, being of the nature of immoveable property situate within the Maharaja's domains, could not legally be sold at Benares by the Benares Court. The lower Court has allowed both grounds and decreed the plaintiffs' claim to recover the purchase-money from the defendants decree-holders in the proportions in which it was paid to them respectively. The conclusion at which it has arrived is amply warranted by the circumstances of the case.

That the plaintiffs would have purchased a lien on property which had already been sold in satisfaction thereof, if they had not been deceived and misled by the false representation made of the former sales having been set aside, is wholly incredible, and the false representation must be held to constitute in law such fraud as vitiates the sale. Nor can there be any doubt that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situated within the Maharaja's domains. The sale is indeed liable to another objection which touches the validity of the decree of 18th November, 1874. It seems that the Subordinate Judge had not jurisdiction to entertain the suit instituted in his Court by Harish Chandar and Gokal Chandar, in so far as it related to property which was situated not within his jurisdiction but in the Maharaja's Domains. It seems that he was authorized to proceed with the suit under the provisions of s. 13 of

Act VIII. of 1859, by the High Court in concurrence with the Sudder Board of Revenue, and that in authorizing the trial of the suit the High Court inadvertently followed a practice which had been introduced in 1864, but discontinued as being of doubtful legality in 1867. The later opinion has more recently been embodied in a judicial ruling in S. A. No. 969 of 1877, decided the 14th December, 1877 (1). We are disposed to concur in that ruling, and to consider that the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immovable property in suit is situate within the domains of the Maharaja of Benares. Those domains do not constitute a district within the meaning of the section. We agree with the lower Court in holding that the suit is not precluded by reason of the rejection of the application made under s. 313 of Act X of 1877, and is not bad for misjoinder. It is unnecessary to discuss the second ground of appeal and the fourth was abandoned. The appeal is dismissed with costs.

Appeal dismissed.

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March 14.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA v. CHIDDA KHAN.

Witness—Judge or Magistrate—Act I of 1872 (Evidence Act), s. 121—Power of Sessions Judge to compel Magistrate to give evidence.

A Sessions Judge, finding in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the District objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question whether or not his proceeding was contrary to law to the High Court.

Per STUART, C. J., PEARSON J., OLDFIELD, J., and STRAIGHT, J.—That the privilege given by s. 121 of Act I of 1872 is the privilege of the witness, i. e., of the Judge or Magistrate of whom the question is asked: if he waives such privilege or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not

(1) Unreported.

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having been taken by the Subordinate Magistrate but by the Magistrate of the District, should be answered accordingly.

Per SPANKIE, J.—That a Sessions Judge, while trying a case, cannot compel a committing Magistrate to answer questions as to his own conduct in Court as such Magistrate.

THIS was a case stated for the opinion of the High Court by Mr. Clarmont Daniell, Sessions Judge of Moradabad. It appeared from the referring letter of the Sessions Judge to the Registrar of the High Court, dated the 25th January, 1881, that, in a certain trial held by him, having ascertained that the committing Magistrate, a Native Subordinate Magistrate, had failed to comply with the provisions of s. 346 of Act X of 1872, in the examination of several of the accused persons, the Sessions Judge had summoned him, with reference to the last paragraph of that section, to give evidence that such persons duly made the statements recorded by him. The Magistrate of the District objected to this proceeding on the part of the Sessions Judge, relying on s. 121 of Act I of 1872. The Magistrate was of opinion that the Sessions Judge's "procedure in examining" the committing Magistrate "as to his own conduct in Court as a Magistrate without a special order, either of the High Court or of the Magistrate of the District was contrary to law," arguing, with reference to the case of *Gur Dayal* (1) that the committing Magistrate was not subordinate to the Sessions Judge, and that there was nothing in Act X of 1872 which empowered the Sessions Judge to issue to any Magistrate the special order referred to in s. 121 of Act I of 1872. The Sessions Judge contended, with reference to the powers conferred on him by s. 295 of Act X of 1872, that the committing Magistrate, as such, was subordinate to him, and, therefore, the examination by him of the committing Magistrate did not conflict with the rule laid down in s. 121 of Act I of 1872 and was not "contrary to law." The Sessions Judge desired an authoritative settlement by the High Court of the question indicated above at issue between himself and the Magistrate of the District. The case was laid before the Full Court, by which the following judgments were delivered :—

STRAIGHT, J. (STUART, C. J., PEARSON, J., and OLDFIELD, J., concurring).—The privilege given by s. 121 of the Evidence Act is

(1) 1 L. R., 2 All. 205.

the privilege of the witness, *i.e.*, of the Judge or Magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. We would answer this reference accordingly, the objection not having been taken by the Deputy Magistrate, but by the Magistrate of the District.

SPANKIE, J.—I have considerable doubt whether we ought to entertain this reference. Neither the Deputy Magistrate examined by the Sessions Court nor the Magistrate of the District have called for the Court's interference. S. 121 of the Evidence Act merely provides that, except upon the special order of some Court to which he is subordinate, no Judge or Magistrate shall be *compelled* to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to any thing which comes to his knowledge in Court as such Judge or Magistrate, but he may be examined as to other matters which occurred in his presence whilst he was so acting. There is nothing in this section which forbids such Judge or Magistrate being called as a witness, and if he does not object to answer questions as to his own conduct in Court, there appears to be no prohibition to his doing so. But he cannot be compelled to answer such questions except upon the special order of some Court to which he is subordinate. The illustrations to s. 121 seem to show that the Sessions Judge could not compel the Magistrate to answer such questions. I know of no provision in the Code of Criminal Procedure which gives the Sessions Judge, whilst trying a case, the power of compelling a Magistrate to answer questions as to his own conduct in Court as such Magistrate.

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CIVIL JURISDICTION.

1881
March 12.

Before Mr. Justice Oldfield and Mr. Justice Straight.

THE MAHARAJA OF BENARES (PLAINTIFF) v. DEBI DAYAL NOMA
(DEFENDANT).

"Signed"—"Stamped"—Act X of 1877 (*Civil Procedure Code*), s. 2.

The expression "person referred to" in s. 2 of Act X of 1877 means person referred to in the subsequent sections of the Code, as being required to sign or verify certain documents, and it is not a condition precedent to such person being able to use a stamp that he should be unable to write his name.

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THE MAHA-
RAJA OF
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NOMA.

THIS was a reference to the High Court by Babu Ram Kali Chaudhri, Judge of the Court of Small Causes at Benares. The plaintiff in a suit instituted in that Court by H. H. Maharaja Ishri Prasad Narain Singh Bahadur, Maharaja of Benares, was not signed by the plaintiff, but was stamped with his name and title. The Judge was of opinion that, as the plaintiff was able to write, the plaint was not "signed" by him within the meaning of s. 53 of Act X of 1877, holding, with regard to the terms of s. 2, and more particularly with regard to the words "person referred to," that "signed" as defined in that section included "stamped" only when the person using the stamp could not write. Entertaining, however, some doubt on the point the Judge referred it to the High Court for decision.

Munshi Hanuman Prasad, for the plaintiff.

The defendant did not appear.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—We are of opinion that the word "stamped," as mentioned in s. 2 of Act X of 1877, is not limited in the manner suggested by the Judge of the Small Cause Court. We think that the expression "person referred to" means person referred to in the subsequent sections of the Code, as being required to sign or verify certain documents, and that it is not a condition precedent to such person being able to use a stamp that he should be unable to write his name.

1881
March 25.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HAZARI LAL (PETITIONER) v. KHERU RAI (OPPOSITE PARTY).*

High Court's powers of revision under s. 622 of Act X of 1877 (Civil Procedure Code)—Regulation XVII of 1806—Redemption of Mortgage.

After a mortgage had been foreclosed under the provisions of Regulation XVII of 1806 the representative of the mortgagor deposited the mortgage-money in Court. The District Judge ordered that the money should be paid to the mortgagee on the ground that the mortgagor had not been personally served with the notice required by s. 8 of that Regulation, and that it did not appear that she had

Application, No. 9 of 1881, for revision under s. 622 of Act X of 1877 of an order of J. W. Power, Esq., Judge of Gházipur, dated the 4th January, 1881.

been aware of the foreclosure proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the terms of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under s. 622 of Act X of 1877.

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Held that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction and should be set aside.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. It appeared that in 1869 one Imaman Bibi had made a conditional sale to the applicant, Hazari Lal, of a certain share in a certain village. In 1873, the term of such conditional sale having expired, and the mortgage-money not having been paid, Hazari Lal applied to the District Court, under Regulation XVII of 1806, that such conditional sale might be made absolute. The notice required under that Regulation was issued, and in 1874, on the expiry of the year of grace, without the mortgage-money being deposited, such conditional sale was declared absolute. In 1880 Imaman Bibi sold her right in the property to one Kheru Rai, who deposited the mortgage-money in court, and applied to the District Court for redemption. Hazari Lal, who had been placed in possession of the property by the conditional vendor under the terms of the conditional sale, and was in possession of the same at the time of this application, preferred certain objections to the application. The District Judge ordered that the money should be paid to Hazari Lal, on the ground that the notice required by Regulation XVII of 1806, s. 8, had not been served on the conditional vendor, Imaman Bibi, personally, as required by that law, and that it did not appear that she had been aware of the proceedings to make the conditional sale absolute. With regard to the objections preferred by Hazari Lal, the District Judge remarked that his functions were merely ministerial and he need not notice such objections. The District Judge subsequently made an order directing Hazari Lal to surrender the property to Kheru Rai.

The present application was preferred by Hazari Lal for the revision of the District Judge's proceedings on the ground that he had acted without jurisdiction.

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Mr. Conlan, Pandit Ajudhia Nath, and Babu Jogindro Nath Chaudhri, for the petitioner.

The Senior Government Pleader (Lala Juala Prasad) and the Junior Government Pleader (Babu Dwarka Nath Banarji), for Kheru Rai.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J. — Since giving the decision in application No. 27 B of 1880, decided the 10th June, 1880 (1), we have had an opportunity in Full Bench of further considering the operation of s. 622 of the Procedure Code, and we are of opinion that an application such as that now before us is entertainable under its provisions. It would be anomalous, indeed, if, when we found, as in the present instance, that a Judge, ostensibly acting under the Regulations relating to foreclosure, had passed an order or orders without jurisdiction, we should have no power to interfere and protect the party affected. In this case the order directing payment of the money to Hazari Lal, and the further one respecting delivery of possession of the mortgaged property, were altogether *ultra vires* and should have no force or effect. The Judge remarks that his functions are purely ministerial, and yet in the same breath he deals with the matter as if it were before him judicially. The proceedings in foreclosure were perfected in 1874, when the year of grace having expired and the mortgage-money not having been deposited, the mortgagor's right to redeem was gone. What remained for the mortgagee to do was to bring a suit for possession, the final and conclusive method of establishing his title if he was out of possession, or if in possession to sue for a declaration of his right. In either of those cases the mortgagor might have set up, by way of defence, that the foreclosure had been informally or irregularly determined, or that a sufficient deposit had been made, or that nothing was due, or he might have made all these matters ground for a suit by himself to set aside the mortgage proceedings. But of points such as these the Judge had no power to take cognizance when the application the subject of the present revision was before him, seeing that the year of grace had expired and the foreclosure order made.

(1) Unreported. Decided by Straight, J., and Oldfield, J.

In our opinion; it was altogether incompetent for him to receive the money, or direct its payment to Hazari Lal. As to the further order dispossessing the mortgagee, it was quite erroneous and without jurisdiction. This application must, therefore, succeed, and the two orders of the Judge hereinbefore mentioned must be set aside. The applicant will receive his costs.

Application allowed.

APPELLATE CIVIL.

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HAZARI LAL
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1881
March 26.

Before Mr. Justice Oulfield and Mr. Justice Straight.

RATI RAM AND ANOTHER (JUDGMENT-DEBTORS) v. CHIRANJI LAL
AND ANOTHER (OPPOSITE PARTIES).*

*Sale in execution of decree—Separate sales in execution of decrees—Act X of 1877
(Civil Procedure Code), s. 295.*

Application was made for execution of a decree for money against *R*, and also for execution of a decree for money against *R* and another person jointly and severally. Certain immoveable property belonging to *R* was sold in execution of the first decree, the assets which were realized by such sale being sufficient to satisfy the amounts of both decrees. Such property was then sold a second time in execution of the second decree. *Held*, under these circumstances, that the second sale should be set aside, not being allowable with reference to the provisions of s. 295 of Act X of 1877.

ONE Tulsi Ram and one Karori Mal held a decree for Rs. 63-13-0 against one Rati Ram. One Chiranji Lal held another decree for Rs. 365-13-6 against Rati Ram and one Juala Singh jointly and severally. Rati Ram owned sixty-six bighas of land, and Juala Singh owned forty-five bighas; and the two persons owned 318 bighas in common. The whole of this property was separately attached and ordered to be put up for sale in execution of each of these decrees. The officer conducting the sales first put up to sale the sixty-six bighas of land belonging to Rati Ram and his interest in the land held by him and Juala Singh in common, in execution of the decree first mentioned, and the lot was knocked down for Rs. 435, a sum sufficient to satisfy both decrees. The officer then proceeded to put up for sale again in execution of Chiranji Lal's

* First Appeal, No. 172 of 1880, from an order of Ahmad Husain Khan, Munsif of Nagina, in the District of Moradabad, dated the 19th July, 1880.

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decree the property which had been already sold, and also the forty-five bighas of land belonging to Juala Singh and his interest in the land held by him and Rati Ram in common, and the lot fetched Rs. 140. Rati Ram and Juala Singh joined in preferring objections to this second sale, contending that, under the circumstances, a second sale was irregular, and they had been substantially injured by such irregularity. The Court executing the decrees held that the officer conducting the sales was bound to hold separate sales, and therefore had not acted irregularly in so doing. The judgment-debtors appealed to the High Court.

Munshi *Banuman Prasad*, for the appellants.

Pandit *Bishambhar Nath* and Munshi *Sukh Ram*, for the respondents.

The judgment of the Court, after stating the facts, continued as follows :—

OLDFIELD, J. (STRAIGHT, J., concurring).—In my opinion, the second sale should be set aside. The re-sale of the property already sold in execution of the first decree is not allowable with reference to the provisions of s. 295, Civil Procedure Code, by which, whenever assets are realized by sale, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, such assets, after deducting the costs of the realization, shall be divided rateably among all such persons. Chiranji Lal held a decree for money against Rati Ram for the amount of which he and others were jointly and severally liable, and he had applied for execution against Rati Ram, and was entitled to share rateably in the assets realized by the first sale under s. 295 ; but the property of Rati Ram could not be again sold in satisfaction of his decree. That decree also could have been fully satisfied out of the assets realized by the first sale. I would decree the appeal with costs and set aside the sale.

Appeal allowed.

FULL BENCH.

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March 26.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

KANHAYA LAL (PLAINTIFF) v. STOWELL (DEFENDANT).

Note or memorandum acknowledging Debt—Promissory Note—Insufficiently stamped document, admissibility in evidence of—Act XVIII of 1869 (General Stamp Act), s. 3 (25), sch. ii, No. 5.

The plaintiff sold and delivered certain goods to the defendant. The defendant gave the plaintiff, in respect of the price of such goods, the following instrument: "Agra, 14th November, 1877. Due to K, cloth-merchant, the sum of Rs. 200 only to be paid next January, 1878." This instrument was stamped with a one anna adhesive stamp. The plaintiff claimed in the present suit from the defendant Rs. 200, and interest on that amount at twelve per cent. per annum, from the 14th November, 1877, to the date of suit. Held by STUART, C.J., PEARSON, J., OLDFIELD, J., and STRAIGHT, J., treating the suit as one for a debt, that, although such instrument was not admissible in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgment of such debt.

Per SPANKIE, J., treating the suit as based upon a promissory note, that such instrument, being insufficiently stamped, was not admissible in evidence.

THIS was a reference to the High Court by Major F. W. Chatterton, Judge of the Cantonment Court of Small Causes at Agra. The plaint in the suit out of which this reference arose stated as follows: (i). That the plaintiff had supplied the defendant with goods from the year 1875 to 1877 as per account-books; (ii) that the defendant acknowledged a sum of Rs. 200 to be due for the said goods on the 14th November, 1877, as per memorandum annexed; (iii) that the defendant had not paid the same; and (iv) that the plaintiff prayed judgment for Rs. 200 principal, and Rs. 72 interest, at Rs. 12 per cent., for three years, or Rs. 272 in all. The defence to this suit was that the document referred to in the plaint was a promissory note and was not admissible in evidence, in the first place, because it was not sufficiently stamped, and, secondly, because it was not stamped at the time of execution. That document, which was signed by the defendant, and bore a one anna adhesive stamp, was in these terms: "Agra, 14th November, 1877.—Due to Kanhaya Lal, cloth-merchant, the sum of Rs. 200 only, to be paid next January, 1878." The plaintiff contended that the docu-

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ment was not a promissory note, but was merely an acknowledgment of a debt given to him by the defendant in order to save limitation, and it was, therefore, properly stamped; and he further contended that it was stamped at the time of execution. The Small Cause Court Judge was of opinion that the document was a promissory note, but being doubtful on the question referred it to the High Court for decision.

The reference was laid before Spankie, J., and Straight, J., who differed in opinion as to the answer to be made to the reference, and submitted the matter to the Full Bench. The opinions of those learned Judges were as follows :—

SPANKIE, J.—We are asked whether an instrument running in the following words is or is not a promissory note : “Agra, 14th November, 1877.—Due to Kanhaya Lal, cloth-merchant, the sum of Rs. 200 only, to be paid next January, 1878.” The claim of the plaintiff is that he supplied the defendant with goods from the year 1875 to 1877, details being entered in his account-books; that the defendant, on the 14th November, 1877, acknowledged a balance of Rs. 200, “as per memo. annexed,” i.e., the instrument referred to us. He, plaintiff, not having been paid in January, 1878, sues for the Rs. 200, with interest for three years from the date of the instrument. The defendant pleads that the instrument is inadmissible, being an insufficiently stamped promissory note, and because it was not stamped at the time of execution. The plaintiff avers that the memorandum is nothing more than an acknowledgment of the money due to himself by the defendant. It seems to me that we are concerned with the question so far as this—Is the document the note or memorandum referred to in art. 5, sch. ii of the General Stamp Act of 1869, or is it a promissory note referred to in art. 2, sch. i of that Act? In coming to a conclusion on the question, we must be guided by the wording of the Stamp Act.

The note or memorandum in art. 5, sch. ii of the General Stamp Act is “written in any book or written on a separate paper, whereby any account, debt or demand, or any part of any account, debt or demand therein specified, and amounting to Rs. 20 and upwards, is expressed to have been balanced or is acknowledged to

be due." A promissory note is defined by cl. (25), s. 3 of the Act as including "every instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight." The instrument referred to us is an acknowledgment of a balance of account due, but it is something more. Had it run thus: "Due to Kanhaya Lal the sum of Rs. 200," and had it been written when the accounts were gone into and balanced, it would have been the note or memorandum referred to in art. 5, sch. ii of the Act. But when the words "to be paid next January, 1878," are added, I think that the instrument becomes something more than the mere note or memorandum, and falls within the definition, for the purposes of the Stamp Act, of a promissory note, because the maker engages absolutely to pay Rs. 200 to Kanhaya Lal within a limited time, i.e., in January, 1878. I may add that there can be no doubt that the instrument is sued on, for the plaintiff claims interest upon Rs. 200 from the date of the note, 14th November, 1877, to the date of suit. If it was a mere note or memorandum under art. 5, sch. ii, he was obliged to sue upon it, as an acknowledgment of the money being due, or the claim would have been barred by limitation. I would say that the instrument should be stamped as a promissory note.

STRAIGHT, J.—I cannot concur in the view of my honourable colleague Mr. Justice Spankie. The question really submitted by the reference is whether the document to which our attention is called was admissible as evidence in the case before the Small Cause Court Judge. The plaintiff by his suit sought to recover the sum of Rs. 200 principal for goods sold and delivered to the defendant between the years 1875 and 1877, with interest, and his plaint is substantially framed as for a debt due, for the debt was not destroyed, only the remedy was barred, but for the paper of 14th November, 1877, which was tendered in evidence as an acknowledgment that would save limitation. It was not offered in proof as a promissory note, or to establish anything more than the collateral fact that on a particular day the defendant had admitted a specific sum to be due and owing from him. Why, because the document contains incidental words, amounting to a promise to pay, while its direct and substantial character is that of an acknowledgment of debt, it is to be excluded from proof, I cannot

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understand. The question between the parties was not whether the defendant had promised to pay the plaintiff his debt, but whether that debt was due and recoverable. The defendant never denied the genuineness of the paper writing of 14th November, 1877, or questioned the accuracy of the amount alleged to be owing from him, in respect of which the acknowledgment was given. I think, therefore, that the Small Cause Court Judge was in error in refusing to receive the document in evidence, and would so inform him. As authority in favour of the view I have expressed I may mention the case of *Matheson v. Ross*, 2 H. L. Cas. 286; *Gould v. Coombs*, 14 L. J., C. P. p. 175; and *Dhondu Jagannath v. Narayan Ramchandra*, 1 Bom. H. C. Rep., 47.

Mr. *Ross*, for the plaintiff.

The defendant did not appear.

The following judgments were delivered by the Full Bench :

PEARSON, J., (STUART, C.J., and OLDFIELD, J., concurring).—We concur in the view taken by Mr. Justice Straight, and would inform the Small Cause Court Judge in reply to his reference that, although the document in question is not admissible in evidence as a promissory note in proof of a promise to pay, by reason of its being insufficiently stamped, it is nevertheless admissible on the stamp which it bears as a memorandum in proof of an acknowledgment of a debt.

SPANKLE, J.—I do not look upon the note as having been used solely as an acknowledgment of debt. I see no reason to change my opinion that the plaintiff sues on the note and claims principal and interest because the money due was not paid in January. When asked whether the note was a promissory note within the definition of the Stamp Act or merely an acknowledgment of a debt, I am compelled by the terms of the definition in the Stamp Act to say that within the meaning of that Act the document is a promissory note. As the instrument is recorded, it not only acknowledges a debt, but it is a promise to pay the same in January, 1878. It is a new contract, and because there was a breach of it, the plaintiff sued. In a case which came before the

Court,—*Makbul Ahmad v. Istikhar-un-nissa* (1)—in a document which acknowledged a debt of Rs. 975 as being due to the plaintiff there were the words “I promise to pay you this sum in two months.” This instrument was held to be a promissory note, though both the lower Courts had held it to be nothing more than a note or memorandum falling under art. 5, sch. ii, Act XVIII of 1869.

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STRAIGHT, J.—I have nothing to add to the remarks made by me in my former judgment, or to the opinion therein expressed, to which I still adhere.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, Mr. Justice Oldfield, and Mr. Justice Straight.

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DEBI RAI (JUDGMENT-DEBTOR) v. GOKAL PRASAD (DECREE-HOLDER).*

Execution of decree—Execution of compromise—Estoppel.

The parties to a decree for the payment of money altered by agreement such decree as regards the mode of payment and the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor. On the 1st March, 1873, the holder of such decree applied for execution of such agreement. The judgment-debtor objected that such agreement could not be executed as a decree, and such application should therefore be disallowed. *Held* (OLDFIELD, J., dissenting) that such agreement could not be executed as a decree, and such application could not be entertained, and that the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J. The facts of the case and the point of law referred are sufficiently stated for the purposes of this report in the order of reference, which was as follows:—

OLDFIELD, J.—A decree was obtained by the respondent against the appellant in this case on the 14th December, 1863, for a sum of money bearing interest at Re. 1 per cent. per annum. The decree continued to be executed up to September, 1870. Subsequently, in the course of proceedings taken in execution of the decree, the parties entered into an agreement by a deed, dated

* Second Appeal, No. 86 of 1879, from an order of W. Young, Esq., Judge of Moradabad, dated the 9th July, 1879, reversing an order of Maulvi Sami-ulla Khan, Subordinate Judge of Moradabad, dated the 27th July, 1878.

(1) N.-W. P. H. C. R., 1875, p. 124.

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14th September, 1871, by which it was arranged that the sum of Rs. 1,277-8-0 due on that date should be paid by the judgment-debtor with interest at 14 annas per cent. per mensem in two equal instalments at the end of 1872 and 1873, respectively, and in case of default of payment of the instalments, it would be competent for the decree-holder to realize the entire amount of the decree in a lump sum, with interest at Rs. 2 per cent. per annum, from the date of breach of contract, from the judgment-debtor personally and from his property. An application was made by the decree-holder to execute the decree in the terms of the above agreement on 21st July, 1873, and the judgment-debtor's property was attached, and a date for sale fixed; but the proceedings came to an end on 24th October; the attachment, however, continued in force. Another application for execution was made on 28th November, 1874, which was struck off on 10th May, 1875. Again on the 12th January, 1876, the decree-holder applied for execution, and the judgment-debtor's property was advertised for sale. Part payment towards satisfaction of the decree was made by the judgment-debtors. The property was sold on 23rd October, 1876; but the sale was subsequently cancelled on 22nd June, 1877, and the case struck off. On 22nd June, 1877, the decree-holder again made application to execute, and the judgment-debtor's property was sold, and the sale was confirmed on 20th September, 1877. In all the above proceedings the Court allowed execution on the terms of the agreement dated 14th September, 1871. On the 1st March, 1878, the decree-holder again made application to execute the decree on the terms of the said agreement; and this application is the subject of the appeal before us. The Court of first instance has held that the agreement superseded the decree which became no longer capable of execution, and it dismissed the application. The Judge, on the other hand, has allowed execution of the decree under the agreement, except in so far as its terms allowed enhanced rate of interest to be charged. The judgment-debtor in appeal contends that the decree of 14th December, 1863, was superseded by the agreement dated 14th September, 1871, and execution cannot proceed on the agreement, and the decree-holder's application should be disallowed. We refer the case to the Full Bench of the Court. The following cases may be referred to: *Sadasiva Pillai v. Ramalinga Pillai*,

15 B. L. R. 383: *Sheo Golam Lall v. Beni Prasad*, I. L. R., 5 Calc. 27.

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Pandit *Bishambhar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—On the case stated in the reference I am clearly of opinion that the Judge was wrong, and that the more correct view of the law has been taken in the judgment of the Court of first instance. I have looked into the records for the very words of the agreement of the 14th September, 1871, and I find that it contains a distinct statement of the money due under that date. It states: "Whereas, &c., it has been settled that the whole of the amount of the decree, principal with interest and costs due up to date, being Rs. 1,677-8-0, is declared to be due to the decree-holder from us the judgment-debtors, and out of that the said judgment-debtors have paid Rs. 400 to me, the decree-holder; and as regards the balance of Rs. 1,277-8-0, the amount of the decree, it is settled that Rs. 638-12-0 out of it is to be paid, with interest at 14 annas per cent. from this day, at the end of 1872, and Rs. 638-12-0 at the said rate is to be paid at the end of 1873, and in the event of default in paying the instalments the decree-holder shall be at liberty to realize the whole amount of decree in one lump sum, with interest at two per cent. per mensem from the date of the default, from the hypothecated and other property of the judgment-debtors; and the property hypothecated under the decree should still remain hypothecated and pledged; and we the judgment-debtors shall raise no objection in respect of the instalment, &c., therefore we have executed this by way of compromise that it may serve as an authority." Now, in the first place, I hold that this amounted to a complete abandonment of the decree as such, and, secondly, that this was an agreement not for the purpose of keeping the decree alive for execution, but as a mere record of the sum that was due by the one party to the other, and that such an agreement could not be enforced in the execution department, but, if at all, only by a separate

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suit. The words in the agreement "the whole of the amount of the decree" and "the whole amount of decree in one lump sum" did not and do not mean that the decree itself was to be executed to that effect, but were merely intended as terms descriptive of the amount acknowledged to be due by the party who had been judgment-debtor to the party who had been decree-holder. The decree had thus become incapable of execution not only by the law of limitation, but by estoppel under the agreement which superseded it.

The case of *Stowell v. Billings* (1), decided by Spankie, J., and myself, appears to be in point so far as it goes, and the same remark applies to the case of *Sheo Golum Lall v. Beni Prasad* (2). With regard to the case of *Sadasiva Pillai v. Ramalinga Pillai* (3), it is an authority directly in favour of the view I have explained, that in such a case as the present the only remedy is by a suit on the agreement, if any, and determines the particular case then before the Council under "the special circumstances," which it was considered "take the plaintiff's claim out of the general rule." The appeal to this Court should therefore be allowed, the order of the lower appellate Court reversed, and that of the Court of first instance restored with all costs.

PEARSON, J.—The point for consideration appears to be whether a judgment-debtor, who submits to the partial execution in the execution of decree department of a compromise by which a decree has been superseded, is estopped from afterwards objecting to the continued execution in that department of the same compromise. It seems sufficient to observe that the execution of a compromise is not within the competency of a Court in the execution of decree department; and that the consent of the parties to the decree or the conduct of either of them cannot give to the Court a jurisdiction which the law does not confer upon it. In the case before us, the proceedings in execution of the compromise dated 14th September, 1871, being null and void for want of jurisdiction must count for nothing; and the application of the 1st March, 1878, which, if it be an application for the execution of the compromise, cannot be entertained, and, if it be an application for the execution

(1) I. L. R., 1 All. 350. (2) I. L. R., 5 Calc. 27.

(3) 15 B. L. R. 383.

of the decree of the 14th December, 1863, is barred by limitation. I would allow the appeal with costs, reversing the lower appellate Court's order and restoring that of the Court of first instance.

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SPANKIE, J.—It appears to me that the ruling of this Court, and indeed of the Presidency Court to which attention was directed, in the case of *Stowell v. Billings* (1) is unaffected by the decision of the Privy Council noticed by the Judges who referred the present case. Their Lordships of the Privy Council remark in that case—*Sadasiva Pillai v. Ramalinga Pillai* (2)—as follows :—"It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plaintiff's claim out of the general rule ; and are sufficient to support the order of the Civil Court of the 31st of January, 1872. And their Lordships will now proceed to consider what those circumstances are and the legal effect of them." The plaintiff in that case had obtained a decree for possession, and had there been no appeal, and the decree had been followed by immediate execution, he would have been put into possession of his lands, and would ever since have received the rent and profits of them. The only mesne profits touching which any question would have arisen would have been those for the year between the date of institution of the suit and that of the decree. Execution was suspended but not necessarily suspended by the appeal, and the defendant could only remain in possession on the terms of giving security for execution of the decree should it be affirmed against him. He did so. The instruments which he executed were addressed to the Civil Court. They contained an obligation to pay subsequent mesne profits for the years which they respectively cover, and pointed even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realization, if not then paid by the Court. Their Lordships thus describe the effect of these documents. "The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the

(1) L. L. R., 1 All. 350. (2) 15 B. L. R., 383.

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appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question." In consequence of the execution of these instruments their Lordships were of opinion that the defendant came under an obligation to account in the suit for the subsequent mesne profits of plaintiff's land. They held that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the latter clause of the section. But even if it did not, they thought that upon the ordinary principles of estoppel the defendant could not now be heard to say "that the mesne profits in question are not payable under the decree."

It will thus be seen why, notwithstanding the general rule of all the Courts in India that, where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot under the clause in question give execution for such interest or mesne profits, their Lordships in the case of *Sadasiva Pillai v. Ramalinga Pillai* (1) held the defendant liable to account for the mesne profits in execution of the decree. The case was a special one. The defendant had come under an obligation to the Court itself to account in the suit for the subsequent mesne profits, which was capable of being enforced by proceedings in execution. The liability had made the accounting a question relating to the execution of the decree within the meaning of the latter clause of s. 11 of Act XXIII of 1861, and if it did not, defendant was estopped from saying that the mesne profits were not payable under the decree. When the defendant himself created the obligation the decree had not been put in execution. There was no question of altering or varying the terms of the original decree. By his own act the defendant had, in giving security for the due performance of the appellate Court's decree, to account for the subsequent mesne profits in the suit, and that being so, he could not be allowed afterwards to say that they were not payable under the decree. The Court executing the decree called upon the defendant to execute the instruments, and they were executed pursuant to the order of the Court. But the circumstance of the case before us are quite different. The

(1) 15 B. L. R. 383.

decree was dated 14th December, 1863, and was for a sum of money (Rs. 1,440) bearing interest at 12 per cent., and it continued to be executed until September, 1870. Subsequently, in the course of proceedings taken in execution of the decree the parties entered into an agreement by a deed dated 14th September, 1871, by which the amount due on that date under the decree was stated to be Rs. 1,277-8-0, and it was arranged that it should be paid with interest at 14 annas per mensem in two equal instalments at the end of 1872 and 1873, respectively, and in case of default of payment of the instalments, the decree-holder was at liberty to realize the entire amount of the decree in a lump sum, with interest at 24 per cent., from the date of the breach of contract, from the judgment-debtors personally and from their property. This compromise, as it is called, completely altered the terms of the decree. The amount held to be due became payable by instalments, whereas the decree made the amount payable at once at the rate of one rupee per cent. interest per mensem, but the agreement reduced the rate to 14 annas per mensem, and it provided that in case of default the rate of interest should be increased to Rs. 2 per mensem, and that the decree-holder should realize the entire amount of the decree in a lump sum. The Judge observes that the agreement is strictly conformable to the procedure described in s. 210 of Act X of 1877. But even if this were so, the lower appellate Court overlooks the fact that, when the Court admitted the agreement which varied the terms of the decree, it had no authority to do so. The Court executing the decree had no power to execute another agreement in lieu of the decree. In all decrees for the payment of money the Court might for any sufficient reason order that the amount should be paid by instalments with or without interest (s. 194 of Act VIII of 1859). But the order was to be looked for in the decree, and could not be made by the Court executing the decree. The circumstance that what was done in 1871 corresponds with the procedure laid down in Act X of 1877 would not make the Court's action in 1871 legal. But in point of fact the procedure in 1871 did not correspond with that in s. 210 of Act X. of 1877. The parties in 1871 struck a balance and found Rs. 1,277-8-0 to be due under the decree. They made a new contract by which the judgment-debtor bound himself to discharge the

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debt found to be due in two years by two instalments, and to pay interest at different rates than that allowed by the original decree. Whereas in s. 210 of Act X of 1877 no compromise, no agreement, and no new contract are required. After the passing of a decree for money the Court may, on the application of the judgment-debtor, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him or otherwise, as it thinks fit; and there is a further proviso that, save as provided in this section and in s. 206, no decree shall be altered at the request of the parties. Then by s. 210, it is the Court that arranges the matter as it thinks fit and upon its own terms, on the application it is true of the judgment-debtor, and with the consent of the decree-holder; without such application and the consent of the decree-holder the Court would not act at all. But the decree cannot be altered at the request of parties, except as provided in the section, and in s. 206, which latter section refers to the amendment of clerical or arithmetical errors in a decree. The application is for time within which to pay the debt, and if the decree-holder is willing that time should be given, the Court allows the time and itself settles the terms upon which indulgence to the judgment-debtor may be granted.

It will be observed that the lower appellate Court does find that the agreement in 1871 did alter the terms of the decree in one respect at least. The Judge remarks: "It is true that the final interest of Rs. 2 per mensem, which the arrangement came to in 1871 authorized in case of default in payment of the instalments, was a condition which rested solely on the basis of that agreement, and I do not think it is enforceable in the execution department." But if the Court had power in 1871 to alter and vary the decree in one or more respects, it surely had power to do so in respect of the interest. If it had not such power, it could not enforce one condition of a compromise, and refuse to recognize another. It is, I think, certain that from the date of the compromise between the parties the compromise and not the decree of 1863 was executed, and that the decree-holder cannot revert to the original decree, under the terms of the compromise; and I fall back upon the deci-

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sion of this Court already referred to (1) which holds that a compromise of this nature cannot enlarge the limitation provided by law for the execution of decrees.

OLDFIELD, J.—I am of opinion that the judgment-debtor's objection that the agreement which he entered into cannot now be enforced under the decree is not maintainable. The agreement only varied the decree to the extent of directing that its amount should be paid in instalments at a rate of interest less than decreed, and, in case of default of payment, by allowing a rate of interest higher than that payable by the decree. The Judge has not allowed the agreement to be enforced in execution of the decree in respect of the increased rate of interest, and the decision on this point is not objected to in appeal and we are not concerned with it; but there is no reason why the rest of the conditions agreed to should not at any rate be enforced under the decree, as relating to the execution, discharge or satisfaction of the decree under s. 244, Civil Procedure Code; but even if it could be held that the agreement should more properly be enforced by suit and not in execution of the decree, the judgment-debtor must be held estopped from raising this plea, since he entered into the agreement and took the benefit of it and has without objection allowed it to be enforced under the decree since 1873.

The case of *Sadasiva Pillai v. Ramalinga Pillai* (2) is distinctly an authority for this view. In that case the plaintiff obtained a decree for the possession of certain lands with mesne profits up to the date of suit. No claim was made in the suit for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant execution was from time to time stayed by the Court on the defendant giving security to abide the event of the appeal, for the execution of the decree, and for payment of mesne profits accruing while the plaintiff remained out of possession. The decree having been confirmed in appeal the plaintiff applied for execution in respect of the *interim* mesne profits. It was held by the Judicial Committee of the Privy Council that the proceedings whereby the defendant led the Court to stay execution

(1) *Stowell v. Billings*, L. L. R., 1 All. 350. (2) 15 B. L. R., 383.

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and continue him in possession laid him under an obligation to account in the suit for the mesne profits which he engaged to pay, and that this obligation was capable of being enforced by proceedings in execution, since, even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of s. 11 of Act XXIII of 1861, he was estopped from contending that the mesne profits in question were not payable under the decree. Their Lordships remarked: "The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. The Attorney-General of Gibraltar* (1), in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*;" and they go on to observe "that proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal, since in such a suit the plaintiff might recover interest." I have quoted these remarks at length, as the facts of the case we are dealing with make them peculiarly applicable to it. I find also that the above decision was followed by the Calcutta Court in *Shoo Golam Lall v. Beni Prasad* (2), a case very similar to the one we have before us. I would dismiss the appeal with costs.

STRAIGHT, J.—I confess I am unable to follow the remarks of the Judge, where he observes that the agreement of 14th September, 1871, "is strictly conformable to the procedure described in s. 210 of Act X of 1877." At the time that instrument was

(1) L. R., 5 P. C. 516.

(2) I. L. R., 5 Calc. 27.

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executed, s. 194 of Act VIII of 1859 was in force, and the provisions of law were then, as now, that any order for the payment of a decretal amount by instalments was to be made by the Court passing the decree. In the present case, the decree of the 14th December, 1863, contained no provision permitting payment by instalments, nor was any subsequent application made to the Court passing it by the judgment-debtor for the insertion of any such stipulation. Down to the year 1870, the proceedings in respect of it appear to have been of a purely formal character, and the last application to enforce it, in ordinary course, was made on the 30th July, 1870. Between this and the next application on 21st July, 1873, the compromise of 14th September, 1871, was entered into. By that the sum due for principal and interest to date was consolidated at Rs. 1,277-8-0, and it was further provided that this amount should be paid in two equal instalments of Rs. 638-12-0 each, with interest at the rate of 14 annas per cent., at the end of the years 1872 and 1873, respectively. In case of default in either or both of these instalments, it was competent for the decree-holder to realize the entire amount of the decree with interest at Rs. 2 per cent. per annum. It will be found that these terms are very different to those contained in the original decree of 14th December, 1863. By that it was provided that the whole decretal amount, which was estimated at Rs. 1,740, should be satisfied within seven years, that interest thereon should be paid annually, and that in case of default the plaintiff should be entitled to realize the entire decretal sum at once. Default it seems was made in the payment of the full interest for 1870, and that was the ground upon which the last regular application to execute the decree was made on the 30th July, 1870. Moreover, it will be observed that before the compromise of 14th September, 1871, was entered into, the seven years limit given by the decree for satisfaction of the principal sum had expired, and the time had arrived, if it had not before, when the decree could be executed in its entirety. It appears to me that the compromise of 14th September, 1871, was an entirely new agreement, creating fresh obligations, and contemplating an extension of the period of limitation from three years from 30th July, 1870, when the last regular application to execute the decree was made, or from 14th December, 1870, when default in

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satisfaction of the principal sum had been completed, to three years from 1872 or 1873, at the option of the judgment-creditor. I am unaware of any provision of law by which decree-holders and their judgment-debtors can, by agreement between themselves, alter the period of limitation applicable to a decree, and make use of the execution department to enforce it. I certainly do not understand the two cases mentioned in the referring order (1) to be authorities in favour of such a view, nor does it appear to me that any question of estoppel arises in the present case. The last regular application to execute the decree of 14th December, 1863, was made on the 30th July, 1870, when default had been made in payment of the instalment of interest for that year. The next application was on the 21st July, 1873, when default had been made in payment of the half instalment of the principal sum as stipulated in the compromise of 14th September, 1871. This last application, and the four others that have succeeded it, have all been in reality to execute, not the decree of 1863, but the compromise of 1871. It is patent upon the face of it that at the end of the year 1873 limitation barred the execution of the decree, as no application had been made to execute it, and whatever arrangement the parties might enter into, it does not appear to me that they could stop limitation running. Consequently whether the judgment-debtors were or were not estopped from objecting to the decree being executed in the terms of the compromise, the Court asked to execute it could only treat it as an application to execute the decree of 1863, and was itself bound to take notice that it was barred by limitation. I would reverse the decision of the lower appellate Court with costs, and restore that of the Subordinate Judge.

Appeal allowed.

(1) *Sadasiva Pillai v. Ramalinga Pillai*, 15 B. L. R. 383; *Shoo Golam Lall v. Beni Prasad*, I. L. R., 5 Calc. 27.

CRIMINAL JURISDICTION.

1881
March 7.*Before Mr. Justice Oldfield.*EMPRESS OF INDIA *v.* RANDHIR SINGH.*Causing death by a rash or negligent act—Voluntarily causing hurt—Act XLV of 1860 (Penal Code), ss. 304A., 323.*

A person, without the intention to cause death, or to cause such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, or the intention to cause grievous hurt, or the knowledge that he was likely by his act to cause grievous hurt, but with the intention of causing hurt, caused the death of another person by throwing a piece of a brick at him which struck him in the region of the spleen and ruptured it, the spleen being diseased. *Held* that the offence committed was not the offence of causing death by a rash or negligent act, but the offence of voluntarily causing hurt.

THIS was a reference to the High Court under s. 296 of Act X. of 1872, by Mr. J. H. Prinsep, Sessions Judge of Cawnpore, of a case in which the Sessions Judge was of opinion that the conviction under s. 304A. of the Penal Code was contrary to law, and the conviction should have been under ss. 323 or 304. The facts of the case are stated in the order of the High Court.

OLDFIELD, J.—The facts in this case are that the deceased's pigs were grazing in the accused's field, and the deceased not immediately driving them out when called on to do so by the accused, the latter took up a piece of a brick and threw it at deceased from a distance of five paces; it struck him over the spleen, which, being in a diseased state, was ruptured, and death ensued. The blow does not appear to have been a violent one, as it left no mark on the skin. The Magistrate convicted the accused of an offence under s. 304A., Indian Penal Code, (Causing death by a rash or negligent act), and inflicted a fine of Rs. 15, which was paid. The Judge has sent the case up for revision, as he considers the offence is not one under s. 304A., and the sentence is inadequate. There is no doubt that the facts do not constitute an offence under s. 304A. The offence of causing death by a rash or negligent act, within the meaning of the section, is not committed where an intention exists on the part of the offender to cause hurt to some particular person, as was the case here. Such an offence is otherwise provided for in the Penal Code. The nature and scope of the offence under s. 304A. appears to me to have been rightly explained in *Nidamarti*

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Nagabhushanam (1). The learned Judges observe: "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories." The only offence which the facts appear to me to establish is voluntarily causing hurt under s. 323. They certainly do not establish the offence of culpable homicide; since, looking to the implement used, and the moderate force with which the brick was thrown, the prisoner cannot be said to have had the intention to cause death, or to cause such bodily injury as was likely to cause death, or even the knowledge that he was likely by his act to cause death. Death would not have been a probable consequence of his act if the diseased spleen had been sound, and the accused was not aware that it was diseased. Nor can I say, looking to all the circumstances, that he intended to cause grievous hurt, or that grievous hurt was a probable consequence of the act. But finding the accused guilty of an offence under s. 323, Indian Penal Code, I consider the sentence to be inadequate, and in addition to the fine already imposed, I sentence him to rigorous imprisonment for three months.

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APPELLATE CIVIL.

Before Mr. Justice Oulfield and Mr. Justice Straight.

KHWAHISH ALI (DEFENDANT) v. SURJU PRASAD SINGH (PLAINTIFF).*

Minor—Majority—Act IX of 1875 (Majority Act), s. 3—Act XL of 1858.

A minor of whose person or property a guardian has been appointed under Act XL. of 1858 does not attain his majority when he completes the age of eighteen years, but when he completes the age of twenty-one years.

* First Appeal, No. 113 of 1880, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 29th May, 1880.

(1) 7 Mad. H. C. Rep., 119.

THE plaintiff in this suit claimed to recover certain moneys lent on his behalf, while he was a minor, to the defendant. He stated in his plaint that he had attained the age of majority on the 1st October, 1877, and that the certificate of guardianship which had been granted to his mother under Act XL. of 1858 had been cancelled by the District Court on the 8th February, 1878, on the ground that he, having completed the age of eighteen years, had attained the age of majority. The defendant set up as a defence to the suit, *inter alia*, that, as the plaintiff's mother had been appointed his guardian under Act XL. of 1858, and as the plaintiff had not at the time of suit completed the age of twenty-one years, the plaintiff had not, regard being had to the provisions of s. 3 of Act IX. of 1875, attained the age of majority, and he therefore could not sue. The Court of first instance disallowed this defence, and proceeded to determine the suit on its merits, and gave the plaintiff a decree. The defendant appealed to the High Court, again contending that the plaintiff, not being twenty-one years of age, was a minor, and was not competent to bring the suit.

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Mr. Gonlan and Pandit *Ajudhia Nath*, for the appellant.

Mr. Colvin, Pandit *Nand Lal*, and Shah *Asad Ali*, for the respondent.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

OLDFIELD, J.—We must allow the first ground of appeal and hold that the plaintiff, being a minor according to the provisions of the Indian Majority Act (Act IX. of 1875) on the date of the institution of this suit, could not maintain the suit. S. 3 of the Act is to the effect that “every minor of whose property or person a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years, and not before.” It appears that a guardian was appointed for the plaintiff under the provisions of Act XL. of 1858, and the certificate of guardianship was subsequently cancelled on 8th February, 1878, when

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plaintiff's age was 18, on the ground that he had attained his majority at that age. This was done in violation of the provisions of s. 3 Act IX. of 1875. The fact, however, that a guardian was appointed under Act XL. of 1858 brings the plaintiff under the operation of s. 3, Act IX. of 1875, and he must be deemed to have attained his majority when he completed his age of 21 years, and not before. The removal of the guardian appointed under Act XL. of 1858, before the minor attained the age of 21, cannot take his case out of the operation of s. 3, for it is sufficient to give effect to the provisions of that section as to the age of majority that a guardian has been appointed for the person or property of a minor by a Court of Justice. As the plaintiff had not attained his majority when the suit was instituted, he was incompetent to maintain it, and the proceedings must be set aside. We decree the appeal and dismiss the suit with costs.

Appeal allowed.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

HUSAIN ALI KHAN (PLAINTIFF) v. HAFIZ ALI KHAN (DEFENDANT).
Registered bond—Act XV of 1877 (Limitation Act), sch. ii, No. 116.

Held that No. 116, sch. ii of Act XV. of 1877, is applicable to a suit on a registered bond for the payment of money.

THIS was a reference to the High Court by Mr. R. M. King, District Judge of Sahāranpur, under s. 617 of Act X. of 1877. The claim in the suit which gave rise to this reference was one to recover Rs. 258-12-0, principal and interest, on an instrument dated the 11th July, 1876, described as a "bond." That instrument was to the following effect: "I, Hafiz Ali, do hereby declare that I have taken a loan of Rs. 300, half from Husain Ali, and half from Khurshed Ali, Asghar Ali, and Ahmad Ali: I agree to repay the said sum with interest at ten annas per cent. per mensem on demand: whatever payments are made shall be endorsed on this bond, and without such endorsement the allegation of a payment shall be invalid." This instrument was duly registered. The plaintiff, Husain Ali, claimed his moiety of the principal sum,

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and the one-third share of Ahmad Ali in the other moiety. The Court of first instance, the Munsif of Muzaffarnagar, was of opinion that the period of limitation applicable to the suit was that provided in No. 116, sch. ii of Act XV of 1877, but, as the District Court had previously decided that the limitation applicable to a suit on a registered money-bond payable on demand was not that provided in No. 116, but in No. 59, the Munsif, following that decision, held that the period of limitation applicable to the suit was that provided in No. 59, and that, as more than three years had elapsed from the date of the loan to the date on which the suit was instituted, the suit was barred by limitation. On appeal by the plaintiff the District Court, being doubtful whether the period of limitation provided in No. 116, sch. ii of Act XV of 1877 was not applicable to the suit, referred to the High Court, under s. 617 of Act X of 1877, the following question for decision:—"Does a registered money-bond come under No. 116, sch. ii. of Act XV. of 1877?"

The reference was laid before Spankie, J., and Straight, J., who referred the question to the Full Bench. The order of reference was as follows:—

SPANKIE, J.—We have been asked whether a registered money bond was subject to a term of three years' limitation under arts. 57, 58, 59, sch. ii, Act XV of 1877, or whether it was subject to a term of six years under art. 116 of the same schedule. The instrument upon which the suit has been brought has the character of a promissory note, and one not accompanied by any writing restraining or postponing the right to sue. It is one of those documents not required by s. 17 of the Registration Act to be registered, but of which the registration is optional under letter (f), s. 18 of the Act. The instrument is registered. At the hearing of the reference Mr. Dwarka Nath Banarji brought to our notice a case in the Presidency Court, being a reference from a Small Cause Court Judge,—*Nobocomar Mookhopadhaya v. Siru Mullick* (1). The decision in this case supports Mr. Dwarka Nath Banarji's arguments that art. 116 of sch. ii of the Limitation Act applies to the claim now before us. The same question has been

(1) I. L. R., 6 Calc. 94.

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raised in other cases, and if we accept the conclusion at which the Court below has arrived, we must change our rulings. I would, therefore, refer the question to the Full Bench of this Court for decision.

STRAIGHT, J.—I concur in the proposed reference to the Full Bench.

The *Junior Government Pleader* (Baba Dwarka Nath Banarji), Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the plaintiff.

Mr. *Leach*, for the defendant.

The following judgments were delivered by the Full Court:—

STUART, C. J.—The document referred to in this reference to us by Spankie, J., and Straight, J., is as follows:—"I, Shaikh Hafiz Ali, son of Fazal Husain, resident of pargana Jansath, zila Muzaffarnagar, do hereby declare that I have taken a loan of Rs. 300 of the Queen's coin, half of which is Rs. 150, from Shaikh Husain Ali Khan, son of Akbar Ali Khan, owner or lender of a moiety, and Khurshed Ali Khan, Asghar Ali Khan, and Ahmad Ali Khan, sons of Asbah Ali Khan, the lenders of the other moiety, in equal halves, residents of Jansath, zila aforesaid, for the payment of the revenue, &c., and brought it into my own use: I agree to repay the said sum with interest at 10 annas per cent. per month at the time of the demand to the said creditors: whatever payments shall be made at different occasions, the same shall be endorsed on this bond, without which the allegation of any payment shall be invalid: hence this bond: dated 11th July, 1876." This document was registered and the question submitted to us is whether it was subject to a term of three years' limitation under articles 57, 58, 59, sch. ii of the present Limitation Act XV. of 1877, or whether a term of six years' limitation under art. 116 of the same schedule applied to it. The document is clearly in the nature of a contract, and, in fact, is on the face of it a contract; and, for the purpose of the question referred to us, it is perhaps unnecessary to say more in regard to its legal character, but I may be allowed to state the opinion I have formed on this subject. I was under the impression at the hearing that it might be regarded as a promissory note, and there can be no doubt that it has some of the leading characteristics of

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such an instrument, for the sum is certain and the debt must be paid at a time certain, *viz.*, time of demand; but, on the other hand, the document provides for payments towards the debt acknowledged by it, which are to be evidenced by endorsements on the note, and this peculiar quality in my opinion takes it out of the category of promissory notes and notes of hand. I rather incline to hold that the document is in the nature of a bond (which, indeed, it calls itself) or an agreement for money lent to be payable on demand within the meaning of No. 59, sch. ii; and, therefore, if it had not been registered, the period of limitation would have been three years from the date of the loan. Whether, however, the document be regarded as a promissory note or an agreement for money lent, it clearly is a contract, and, in my opinion, one within the meaning of No. 116 of the same schedule; and, being registered, the period of limitation that applies to it is six years from the date when the loan was made, being the date provided by No. 59 of the schedule for a money agreement. No doubt registration of this document was not required by law to give it validity. Its registration, however, although permissive, was valid and effectual, and is provided for by (f), s. 18 of the Registration Act III. of 1877, and it is therefore entitled to the privilege allowed to registration by No. 116 of the same schedule, the intention of the law evidently being to favour all documents actually registered by giving them a longer period to run before being overtaken by the law of limitation; the period of limitation in the present case being double of that which would have applied had the contract not been registered, that is six instead of three years. This is my answer to the reference submitted.

SPANKIE, J.—The defendant in this case, on the 11th July, 1876, executed a document in which he acknowledged that he had taken a loan of Rs. 300 from the plaintiffs for the payment of revenue; that he agreed to repay the said sum with interest at ten annas per cent. per mensem and on demand; and that all payments on every occasion of payment were to be endorsed on the back of the bond, or no payment would be admitted. The document was registered. The defendant admitted the execution of the document, but contended that the claim was barred, as the

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District Court had ruled that the limitation was three years under art. 59, sch. ii, Act XV. of 1877. The Munsif had held in some other case that art. 116 of sch. ii applied to a document of the same nature as in this case, because it was registered; but nevertheless he considered himself bound by the Judge's view of the law in the case referred to by the defendant. He therefore dismissed the claim. There was an appeal to the District Judge, who has referred to this Court the point whether a registered money-bond was subject to a term of three years under arts. 57, 58, 59, sch. ii, Act XV. of 1877, or whether it was subject to a term of six years under 116 of the schedule. At the first hearing of the reference Babu Dwarka Nath Banarji brought to our notice a late decision of the Presidency Court—*Nobocomar Mookhopadhaya v. Siru Mullick* (1)—which we cite in our referring order. The Judges who recorded their opinions were the learned Chief Justice and Rounesh Chunder Mitter, J. In the opinion of these learned Judges the document being registered fell under art. 116 of the schedule.

I felt and feel the same difficulty in coming to this conclusion that appears to have been experienced by the Calcutta Court. The learned Chief Justice remarks that "in one sense, of course, every suit for a breach of contract is a suit for compensation; but I should have thought that, in ordinary legal parlance, a suit to recover money due upon a bond, (especially having regard to the form of a single bond in this country), would be a suit *for a debt or sum certain*; whilst, on the other hand, a suit for compensation for breach of contract (art. 116) meant a suit *for unliquidated damages*." The document in this case is one of the nature of a promissory note payable on demand, not accompanied by any writing restraining or postponing the right to sue, and I should have regarded a suit upon it as a claim to recover a debt or sum certain. Ss. 73 and 74, Chapter VI. of the Contract Act, seem to provide for those cases only in which the party who suffers from the breach of contract is entitled to receive from the party who broke the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or

(1) I. L. R., 6 Calc. 94.

which the parties knew, when they made the contract, to be likely to result from the breach of it. In a word, the compensation is for loss and damage as yet uncertain and unascertained, and when the sum to be paid in case of breach of contract is named in the contract itself, whether or not the actual loss or damage is proved, *less* than the sum so named may be allowed, i.e., reasonable compensation; and what is reasonable has to be determined. There is, doubtless, great force in the circumstance that in the Act of 1859 the period of limitation in the case of an engagement to pay or other contract in writing registered was six years. It was the intention of clauses 9 and 10 of Act XIV. of 1859 (1) to make one period for unregistered writing, and another, a longer one, for registered writing. It was also intended that these two periods of limitation should apply to actions to recover money lent or interest as well as to breaches of contract. The period of six years, though not named in cl. 10, is six years as provided in cl. 16 of s. 1 of the Act. It would seem that a suit to recover money lent or interest was regarded as a suit for compensation, inasmuch as the failure to pay a debt when it becomes due is a breach of the conditions upon which the money was lent. It further will be seen that, when Act IX. of 1871 was before the Legislative Council, it was fully intended that there should be no change of the law with regard to registered and unregistered documents. It was explained in the "Statement of objects and reasons" that "Part VIII. (second schedule) provides a period of two years for suits *for all wrongs independent of contract*: Part VIII fixes a period of three years for suits on contracts not in writing registered: where the contract is in writing and registered, the period will (under Part IX) be six years." Nothing can be clearer than this statement. All actions for any wrongs independent of contract were to be brought within

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(1) Cl. 9.—To suits brought to recover money lent or interest, or for the breach of any contract—the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing, &c.

Cl. 10.—To suits brought to recover money lent or interest, or for the

breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered—
* * * the period of three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

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two years. Where the matter between the parties was dependent on contract, the suit, where there was no registered writing, must be brought in three years, and where the writing was registered, in six years. It was upon this footing that the Act was finally passed. Art. 115, sch. ii, was extended to all contracts express or implied. The words are: "For the breach of any contract, express or implied, not in writing registered, and not herein specially provided for." The corresponding article, No. 116, fixes six years for suits "on a promise or contract in writing registered." Here the word "promise," as distinct from "contract," was probably used to represent "engagement," as used in Act XIV of 1859, and as generally understood; for a promise is a voluntary engagement for the performance of some particular thing, and may be in writing or in words, i.e., parol. It will be observed that the words "for the breach of any contract," used in art. 115, are left out in art. 117; but whenever a suit was brought on a promise or contract in writing registered, the limitation was six years, and it cannot be denied that the article covered all registered documents, including what we call bonds and engagements to pay money. When the present Limitation Act was before the Legislature, and up to March, 1877, the wording of the article was the same "on a promise or contract in writing registered." But between March, 1877, and the following July, the words were altered into "compensation for the breach of a contract in writing registered." As no explanation was ever offered why the change was made, it was probably due to the circumstance that the word "promise" in the Contract Act IX. of 1872 is expressly defined. A proposal when accepted becomes a promise [s. 2 (b)] and every promise, and every set of promises, forming the consideration for each other, is an agreement [s. 2 (c)]; and an agreement enforceable by law is a contract [s. 2 (h)]. Promise having been defined, it was not necessary to use the word. It is also probable the word compensation was used because it is used in ss. 73, 74, and 75 of the Contract Act IX. of 1872. It is not so easy to explain why the words "for breach of contract" were added. The words are used both in arts. 115 and 116. We have seen that not only in 1859, but in 1871, the period of six years was assigned to all suits brought to recover money on promises or for breach of contract, provided the promise or con-

tract was in writing registered: and it is difficult to understand why the Legislature should in 1877, and without any explanation, deprive the people of this country of the benefit of a provision in the limitation law which they have enjoyed for so long a period, and which is neither injurious to creditor or debtor, to the money-lender or the borrower. The former has the additional security which registration offers. The latter has a longer time to satisfy his creditor. The use of the word compensation as already observed is a difficulty. Not the less, however, does a debt arise out of a contract, and a breach of the engagement to pay the money on a certain day is, practically, a breach of contract. But it is said that the debt as a remedy "lies to recover a sum certain or capable of being reduced to certainty by calculation, payable in respect of a direct and immediate liability by a debtor to a creditor," and therefore is not a form adopted to claims sounding in damages. But interest in our Courts can in some cases be recovered as damages when it cannot be claimed as a part of the debt; and by s. 209 of the Civil Code, when the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with farther interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment. So also Act XXXII. of 1839, under certain conditions, allows interest at the current rate of the day to be paid from the date when the debt was made payable by virtue of a written instrument, or if payable otherwise from the time of demand of payment and notice that interest will be required. Here the additional interest is paid as damages, and in the Court of Common Pleas, in an action against the drawer of a bill of exchange for £200 with £10 per cent. interest, it was held that the holder might recover interest at £10 per cent. from the time when the bill became due, as well as for the time during which it was running. It was observed by Willes, J., that the jury were not bound to give interest, but may give it according to the circumstances of the case. But Cockburn, C. J., said that "interest is given as damages for the detention of the debt, and here the parties have fixed what the

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rate of damage shall be," i.e., the agreement was to repay £200 with interest at £10 per cent. twelve months after date, and that sum was the measure of the damages from the time the money was due and was not paid. The rest of the Court concurred in the remarks of the Chief Justice.—*Keene v. Keene* (1).

Again, it may be said that, if the interest is given as damages, the suit to recover the money is one for compensation, inasmuch as no man can recover what he actually advances, but he can and does recover what is satisfaction or an equivalent, in fact compensation. There is a contract between the parties who lend and accept a loan, respectively, and by s. 73, where the contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it; such compensation, however, is not to be given for any remote and indirect loss or damage sustained by reason of the breach. The compensation which a party can recover from the party who breaks his contract to repay money lent is an equivalent for the money advanced and all interest that may be due for the detention of the debt. Illustration (n), s. 73, is an instance where there can be no compensation for indirect and remote injury resulting from the breach; but the party who committed the breach is liable for the principal sum he failed to pay, with all interest that may be due. I am further disposed to attach weight to Mr. Justice Mitter's remarks regarding the particular words cited by him from the last column in art. 116 of the schedule of the Limitation Act. The words are "when the period of limitation would begin to run against a suit brought on a similar contract not registered." The similar contract not registered in the case before him he referred back to art. 66:—"On a single bond where a day is specified for payment." Thus if the similar contract was one for which, if unregistered, a period of three years was allowed, it would follow, where the document was registered, that the period would be six years. There remains the further consideration that

(1) 27 L. J., N. S., C. P., 88.

the Legislature has nowhere expressly provided that in future registered and unregistered engagements to pay money should in respect to limitation be on an equal footing. On the contrary, art. 115 assigns the same limitation of three years to suits for compensation for the breach of any contract, *express* or *implied*, not in writing registered, that it does to all breaches of contract specially provided for in other preceding articles. Thus they all are treated alike, and it is unreasonable to infer that any change was intended with regard to contracts in writing registered, which were allowed a period of three years in addition to that provided for similar contracts unregistered. It is the more unreasonable to infer a change, when, as I have already noticed, there is a sufficient explanation of the withdrawal of the word "promise" from the new Act and the, so to call it, amalgamation in the Contract Act of all promises into agreements, and the declaration that an agreement enforceable by law is a contract.

Looking, therefore, upon the question from this point of view, and upon the considerations set forth above, I would reply to the reference that art. 116 should be applied, and the limitation is six and not three years.

STRAIGHT, J.—I concur generally in the judgment of Mr. Justice Spankie, and I agree in his view that the limitation period mentioned in art. 116 of Act XV of 1877 is applicable to suits upon registered money-bonds. The introduction of the word "compensation" has perhaps not unnaturally given rise to some difficulty, but I cannot so interpret it as to hold that the longer period of limitation, of which registered instruments had the advantage before Act XV of 1877 became law, was thereby summarily abridged. Nor upon consideration does it appear to me that the expression compensation is so wholly inapplicable or inappropriate to suits in respect of bonds and promissory notes, as might at first sight seem to be the case. Every bond and promissory note is a contract, by which the obligor or promisor agrees to pay money, either upon a particular date, or upon demand, and such contract can be performed either upon the specified date, or when the demand is made. If payment is refused, or is not forthcoming, then there is a breach, and the suit against the defaulting

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obligor or promisor is, not to make him do something in furtherance of the contract, for the time for its performance is passed, but is in reality one for damages for the breach of it, the measure of which will be the amount of the debt with interest. It is true that there are various articles in the Limitation Act of 1877 making provision in terms for suits for "money lent" or upon "bonds," or in respect of "promissory notes." And art. 115 would not be applicable to them because they are "herein specially provided for." But it seems to me that art. 116 was intended to have a general application to all suits upon registered contracts, and to leave the limitation period in reference to them exactly as it was under art. 117 of Act IX. of 1871. I would therefore answer the question put by this reference in the affirmative.

PEARSON, J.—I concur generally in the remarks which have been recorded by my hon'ble colleagues Spaukie, J., and Straight, J., and in the conclusion at which they have arrived.

OLDFIELD, J.—I agree with my hon'ble colleagues in holding that art. 116, Act XV of 1877, applies to suits brought on registered bonds.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spaukie, Mr. Justice Oldfield, and Mr. Justice Straight.

ALU PRASAD (DEFENDANT) v. SUKHAN (PLAINTIFF).*

Mortgage—Conditional Sale—Pre-emption—Wajib-ul-arz—Cause of action—Compound Interest.

On the 12th May, 1871, *B* mortgaged, by way of conditional sale, a share of a village to *A*, a stranger. Such mortgage having been foreclosed, *A* sued *B* for possession of such share, and obtained a decree on the 16th April, 1878, in execution of which he obtained possession of such share on the 9th September, 1878. On the 1st September, 1879, *S*, a co-sharer, sued *A* and *B* to enforce his right of pre-emption in respect of such share, founding his suit upon the following clause in the administration-paper of the village:—"When a share-holder desires to transfer his share, a near relative shall have the first right; next the share-holders of the other pattis; if all these refuse to take, the vendor shall have power to sell and mortgage, *etc.*, to whomsoever he likes."

*Second Appeal, No. 377 of 1880, from a decree of P. White, [Esq., Deputy Commissioner of Jalaun, dated the 31st January, 1880, affirming a decree of Mirza Muhammad Jafar Bakht, Extra Assistant Commissioner of Jalaun, dated the 15th December, 1879.

Held (PEARSON, J., dissenting), having regard to the terms of the administration-paper, that a cause of action accrued to *S* when such mortgage was foreclosed.

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Per SPANKIE, J., OLDFIELD, J., and STRAIGHT, J., (STUART, C. J., dissenting) that a cause of action also accrued to *S* when such share was mortgaged, by way of conditional sale, to *A*.

B stipulated in the instrument of mortgage to pay the interest annually, and in case of default to pay compound interest.

Held, per STUART, C. J., SPANKIE, J., and STRAIGHT, J., that, inasmuch as *B* would have been obliged to pay compound interest had he desired to redeem the mortgaged property, *A* was entitled to receive from *S* compound interest up to the date of foreclosure.

THIS was a suit to enforce a right of pre-emption. On the 12th May, 1871, the defendant Bansi mortgaged his one anna four pies share of a village called Narsinghpur for Rs. 300 to the defendant Alu Prasad. The deed of mortgage provided that the mortgagor should pay the principal amount within five years; that he should pay interest on the principal amount at the end of every six months at the rate of Re. 1-6-6 per cent. per mensem; that on default compound interest should be payable; and that, if the principal amount and interest were not paid within the term of five years, the mortgage should be deemed a sale. The defendant Bansi did not pay the stipulated interest at the specified periods and did not pay the principal sum with interest at the end of the term of five years; and on the 18th September, 1876, the defendant Alu Prasad applied for foreclosure demanding the principal sum and compound interest or Rs. 912-3-0 in all. The notice to Bansi required by Regulation XVII of 1806 was issued on the 22nd September, 1876. On the 11th March, 1878, the year of grace having expired, the defendant Alu Prasad sued the defendant Bansi for possession of the share, and on the 16th April, 1878, obtained an *ex-parte* decree. In execution of this decree he obtained possession of the share on the 9th September, 1878. On the 1st September, 1879, the present suit was instituted, in which the plaintiff, a co-sharer in the same thoke of the village as that in which the defendant Bansi was a co-sharer, claimed a right of pre-emption in respect of the sale by that defendant to the defendant Alu Prasad of his share, alleging that his cause of action arose on the 9th September, 1878, when the latter obtained

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possession of the share. The suit was based upon the condition relating to pre-emption contained in the village administration-paper, which was as follows:—"When a share-holder desires to transfer his share, a near relative shall have the first right: next the share-holders of the other pattis: if all these refuse to take, the vendor shall have power to sell and mortgage, &c., to whomsoever he likes." The following issues were framed in the suit:—"Whether the suit was barred by limitation;" and "What amount of money is due from the plaintiff to the defendant Alu Prasad." On the first issue the lower Courts concurred in holding, with reference to No. 10, sch. ii of Act XV of 1877, that the period of limitation should be computed from the 9th September, 1878, when the defendant Alu Prasad obtained possession of the share in execution of the decree which he had obtained for possession thereof, and the suit was therefore within time. On the second issue the lower Courts concurred in holding that the defendant was not entitled to be paid the amount for which the mortgage had been foreclosed, as that amount included compound interest, and such interest ought not to be allowed; but that he was entitled to be paid the principal amount, Rs. 300, with interest for five years, from the 12th May, 1871, the date of the mortgage, to the 11th May, 1876, the end of the mortgage-term, at the stipulated rate of Re. 1-6-6 per cent. per mensem, and from the date of default to the date of possession, that is to say, from the 12th May, 1876, to the 9th September, 1878, at the rate of eight annas, by way of damages. The plaintiff accordingly obtained a decree for possession of the share subject to the payment of the amount indicated above within six weeks.

On second appeal by the defendant Alu Prasad the following grounds, amongst others, were taken by the appellant, *viz.*, (i) that with reference to the terms of the village administration-paper the respondent (plaintiff) had no right whatever to institute this suit for pre-emption against the appellant, after the appellant had obtained foreclosure and a decree declaring his proprietary right; (ii) that the cause of action alleged by the respondent was wholly wrong, and, if any cause of action accrued to him at all, it accrued at the time of the mortgage-contract; (iv) that limitation should

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be computed either from the expiry of the year of grace or from the date of the decree obtained by the appellant for possession of the share ; (v) that the decision of the lower Courts as to the amount of the consideration was contrary to law, the respondent being bound to pay the entire amount entered in the foreclosure proceeding, and no objection to the correctness of that amount could now be entertained ; and (vi) that the lower Courts were wrong in holding that compound interest could not be charged.

The appeal came for hearing before Stuart, C. J., and Straight, J., and was referred by those learned Judges to the Full Bench for disposal, the material portion of the order of reference being as follows :—

ORDER OF REFERENCE.—Both the lower Courts decreed the plaintiff's claim, and the defendant now appeals. It is contended on his behalf that any right of pre-emption the plaintiff may have should have been asserted in 1871, when the conditional mortgage was made, and that it is too late for him now to come into Court and allege a cause of action as having accrued to him, when all that has happened is that, by default of the mortgagor and by operation of law, the conditional sale has become absolute. The plaintiff, on the other hand, maintains that, according to the terms of the *wajib-ul-arz*, he was strictly entitled to an offer of the property, both on the execution of the conditional mortgage and on the sale becoming absolute. He further urges that, even if he was only entitled to an offer when the conditional mortgage was made, yet that the time did not arrive for him to bring his suit until the defendant Alu Prasad took physical possession of the property. From these several contentions the substantial question arising appears to be whether, when a conditional sale becomes absolute, a cause of action accrues to a person having a right of pre-emption, upon which he can bring a suit. The point is one of considerable complexity and difficulty, upon which two later decisions of this Court in *Lachman Prasad v. Bahadur Singh* (1) and *Paras Ram v. Phudki* (2) seem to be at variance with earlier rulings of the Sudder Dewanny Adawlut in *Beharee Lall v.*

(1) I. L. R., 2 All. 884.

(2) Unreported.

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Subkaran Rai (1) and *Sugand Rai* v. *Narbus Rai* (2). We therefore think it better to refer this appeal to the Full Bench for disposal.

Muushis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Pandit *Ajudhia Nath* and *Babu Baroda Prasad Ghose*, for the respondent.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—The order of reference in this case states that the substantial question submitted is “whether, when a conditional sale becomes absolute, a cause of action accrues to a person having a right of pre-emption,” but as this question was developed and considered at the hearing before the Full Bench the expression “conditional sale” seemed to me too strong a term to apply to the facts, and is in itself somewhat misleading. I am aware that it is frequently used in Indian Courts to denote a mortgage; but it is at best a loose and inaccurate way of expressing the contract which is known by the term mortgage, and it is better and simpler and more legally correct to keep to that term when such is the transaction than to make use of such a mere paraphrase as the expression “conditional sale”. I therefore prefer to consider that the question referred to us does not so much relate to a conditional sale as to a mortgage, neither more nor less, technically and substantially.

The facts are briefly these :—One Bansi, a defendant in the Court of first instance, but who did not appear to have joined in the appeal to the lower appellate Court nor in the present appeal, mortgaged on the 12th May, 1871, his one anna four pies share of property in mauza Narsinghpur for Rs 300 to Alu Prasad, also a defendant, and the appellant in the present case, upon the condition that, if the principal sum with interest was not paid at the end of five years, the mortgage-deed would become a sale-deed, and he, Bansi, would get his name expunged from the revenue records. Default having been made, the defendant Alu Prasad, on the 18th September, 1876, applied for foreclosure. The usual notice was issued and served on his mortgagor, Bansi, upon the

(1) 10 N.-W. P. S. D. A. Rep. 588. (2) 14 N.-W. P. S. D. A. Rep. 262.

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3rd October, 1876. When the year of grace expired the defendant Alu Prasad, on the 11th March, 1878, brought a suit for possession against Bansi, and on the 16th April, 1878, obtained an *ex parte* decree. This he proceeded to execute in August, 1878, and on the 9th September, 1878, obtained possession of the one anna four pies share. Within a year from the last date, viz., on the 1st September, 1879, one Sukhan, a co-sharer in the property and claiming as a pre-emptor, instituted a suit in the Court of the Extra Assistant Commissioner of Jalaun to establish his right of pre-emption, and making Bansi as mortgagor and Alu Prasad as mortgagee defendants. When the foreclosure proceedings came to Sukhan's knowledge does not appear, but reckoning from the 9th September, 1878, when Alu Prasad obtained possession under his foreclosure decree, Sukhan as pre-emptor was clearly within his right in suing on the 1st September, 1879, on a cause of action which had accrued on the 9th of September of the previous year, when Alu Prasad obtained possession of the property. Sukhan's claim in the suit is based upon the *wajib-ul-arz* of the thoke, and the provision in that paper applicable to the case is stated in the referring order and with substantial accuracy, but at the hearing an exact and literal translation was read out from the vernacular, and so read out the condition in the *wajib-ul-arz* is as follows:—"If any sharer intends to transfer his share, his near relation shall have the first right; then the share-holders in another patti; if all these refuse to take, the transferer shall have the power to sell and mortgage to whomsoever he likes; the objection of no one will be attended to." From these terms it appeared to be assumed at the hearing that mortgages as such as well as sales out and out were intended, but I do not so read the condition. The primary act contemplated by the *wajib-ul-arz* was an act of distinct conveyance or "transfer," or of that which amounted to such a conveyance or transfer, and the use of the word "mortgage" towards the end of the provision in the *wajib-ul-arz* must be understood to have been simply this, that failing the pre-emptors mentioned in it the "transferer" should have the power to sell and mortgage, that is, to dispose of in any way he thought proper the share in question. But a contract and transaction which beginning with an open mortgage might end in a complete transfer was

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something different, for such a contract, so reduced into a complete right, might be, and, in my opinion, would be, a "transfer" within the meaning of the *wajib-ul-arz*, but not till so reduced and made a transfer. And this would appear to have been the state of things on the 9th September, 1878, when as the result of execution of the decree Alu Prasad obtained possession of the property. Then, and not before, the plaintiff's cause of action accrued, and the plaintiff was within his right as a pre-emptor and within time when he instituted the present suit, and that is my answer to the present reference. Numerous authorities were cited at the hearing in support of this view of the plaintiff's position, consisting not only of rulings by the late Sudder Dewanny Adawlut of these Provinces, but also by this Court. Several decisions too of the Calcutta Court were cited in support of the same view. This disposes of the first four reasons of appeal. In regard to the last two, the 5th and 6th, respecting the amount of the consideration to which the vendor is entitled and the charge of compound interest, I think they ought to be allowed, and so far I would modify the decree of the lower appellate Court, but would dismiss the appeal on the question of pre-emption.

PEARSON, J.—The transaction of the 12th May, 1871, to which the present suit refers, appears to have been one of a complex character, by which a share in a thoke of mauza Narsinghpur was mortgaged by Bansi to Alu Prasad for a consideration of Rs. 300 on the condition that, if the principal sum with interest were not paid at the end of five years, the mortgage should become a sale. Foreclosure was effected in 1877, and possession was obtained on the 9th September, 1878, in execution of an *ex parte* decree, and the present suit has been brought by a co-sharer in the thoke, who alleges his cause of action to have arisen on the last mentioned date, to establish his right of pre-emption to the share aforesaid under the terms of the *wajib-ul-arz* dated 15th April, 1863, which are as follows :—"When a share-holder desires to transfer his share, a near relative shall have the first right: next the shareholders of the other pattis: if all these refuse to take, the vendor shall have power to sell and mortgage &c., to whomsoever he likes." From the last clause it may be inferred that sale and

mortgage are equally contemplated by the word "transfer" used in the first. From the words "refuse to take" used in the second it may be inferred that the words "the first right" used in the preceding clause mean the first right to take, and that a duty of offering the share in the first instance to a near relation or to a co-sharer is thereby imposed upon a sharer who desires to part with his share.

We have to consider whether, under the terms above quoted, a cause of action arose to the plaintiff on the 9th September, 1878, or whether he is entitled to claim the share of which the defendant-appellant has become absolute proprietor by foreclosure of his mortgage. The transaction of the 12th May, 1871, though it includes a conditional sale, is one of the recognised species of mortgage; and, if it be regarded as such, the duty of offering the share in mortgage to a near relative or to a co-sharer devolved upon Bansi at the time when he proposed to mortgage it, and a cause of action accrued to the plaintiff when, without having been offered to him, it was mortgaged to Alu Prasad. Doubtless a suit to enforce a right of pre-emption may be instituted within a year from the time when the purchaser takes under the sale sought to be impeached physical possession of the whole of the property sold. The present suit, had it been brought to enforce the right which accrued to the plaintiff on the 12th May, 1871, might therefore in reference to the date on which possession was obtained by the defendant-appellant be within time, but the circumstance that the mortgage was not accompanied with possession did not preclude an earlier suit, nor is the plaintiff asking in this suit for what he was entitled to claim on the 12th May, 1871, *vis.*, to take the share in mortgage. On the contrary he is asking for what he could not then have claimed, *viz.*, to take the share as an out and out purchaser. He himself alleges his cause of action to have arisen on the 9th September, 1878; and although the allegation is obviously inaccurate the material question for determination seems to be whether Bansi was bound on or after receiving notice of the application for foreclosure, because he was unable or indisposed to redeem the mortgage, to offer to sell the share to the plaintiff. It may help the determination of that question to inquire whether Bansi was at that

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time in a position to make such an offer, for he could scarcely be bound to do anything which was not in his power. To such an inquiry the answer must be that he could only sell his equity of redemption. Had he proposed to sell his equity of redemption, he would doubtless have been bound to offer it to the plaintiff in preference to a stranger. But no such transaction as the sale of his equity of redemption has been proposed or attempted by him. What has happened was the conversion of the mortgage of the 12th May, 1871, into an absolute sale by the operation of the condition thereto attached. Upon that incident the terms of the *wajib-ul-arz* appear to have no bearing whatever. They seem to contemplate some original, entire, and distinct transaction on the part of a shareholder and to be applicable at the commencement of such a transaction, not at a subsequent stage. The non-payment of the mortgage-debt within the year of grace was not a sale of the share. The sale of Bansi's share was made not indeed absolutely but conditionally on the 12th May, 1871, and it was before that date and not after the institution of the foreclosure proceedings that he was bound to offer the share to the plaintiff on the footing on which it was taken by the defendant-appellant. It is now impossible that the plaintiff should take the share on that footing. Stress has been laid upon the consideration that the exclusion of strangers from a joint estate is the object of the recognition of the right of pre-emption; and that in the instance before us the defendant-appellant was introduced into the joint estate, not by the mortgage of 1871, but by the foreclosure of 1877 and the decree of 1878. But whatever force there may be in such a consideration, it is really irrelevant to the question of the construction of the terms of the *wajib-ul-arz*. Reference has also been made to several precedents, but it is hardly necessary to refer to them for the purpose of construing the terms of that document, nor can it well be denied that the decision of the present case depends altogether upon the construction to be put on those terms. It must be admitted that they do not expressly provide that a sharer who wishes to mortgage his share by means of a conditional sale must not only offer it in the first instance to a co-sharer, but must also, in the event of the conditional sale being likely to become absolute by failure on his part to redeem the mortgage, offer his equity of redemption for

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purchase to a co-sharer in time to enable him to redeem the mortgage and become the absolute owner. Unless therefore such a provision is substantially included, though latent, in the terms of the *wajib-ul-arz*, the suit cannot be maintained merely because it may be deemed reasonable and equitable to extend the right of pre-emption beyond the cases clearly provided for to cases for which a provision has been omitted. The omission might at any time have been supplied by amendment of the *wajib-ul-arz*. As I am unable without straining the language of that document with undue violence and in an unnatural manner to hold that it includes a provision applicable to the case before us, I am constrained to conclude that the suit is unmaintainable and should be dismissed with costs.

SPANKIE, J —The appeal before the Division Bench appears to have been referred to us for disposal, but the learned Judges observe that the substantial question arising in the case is whether, when a conditional sale becomes absolute, a cause of action accrues to a person having a right of pre-emption upon which he can bring a suit. The point is stated to be one of considerable complexity and difficulty, upon which two late decisions of this Court in *Lachman Prasad v. Bahadur Singh* (1) and *Paras Ram v. Phudki* (2) seem to be at variance with earlier rulings of the Sudder Dewanny Adawlut, two of which may be found in *Beharee Lall v. Subkaran Rai* (3) and *Sugand Rai v. Narbus Rai* (4). The cases of 1879 have been put up with this case, and the judgments have been printed in the book containing the present case. In *Lachman Prasad v. Bahadur Singh* (1) I expressed an opinion on the point referred to us, from which two of my honorable colleagues differed from me. I said in that case that there was no sale without power of redemption until foreclosure had been completed, and the mortgagee or the conditional vendee had obtained a decree for possession as owner. Until these conditions had been fulfilled, the transaction was one of mortgage, as a power of redemption remained. After these conditions have been fulfilled and rendered complete and valid by decree of Court, the transaction once partaking of a double character became a single one, and

(1) I. L. R., 2 All. 884.

(3) 10 N.-W. P. S. D. A. Rep., 588.

(2) Unreported.

(4) 14 N. W. P. S. D. A. Rep., 262.

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that an absolute sale, and possession was given under the sale-deed. On this the pre-emptor's cause of action arose, and under the terms of the administration-paper he was at liberty to bring a suit for pre-emption. I have heard nothing during our hearing of the present appeal to alter the opinion already expressed by me. It has been moreover convincingly shown that the opinion so expressed was in accordance with the rulings of the Court for a quarter of a century. It seems to me that in this country at least, where in cases of this nature the Courts are bound by the Regulations, the interest of the mortgagor under a deed of conditional sale is something more than a bare right. It is said that the equity of redemption is all that is left to him. But there is something more than this. The ownership still remains with him under the contract, for by it the mortgagee acquires only the right to foreclose the mortgage. The property under a deed of conditional sale is not sold outright. It is conveyed to the mortgagee under restriction. The condition is that, if the money borrowed from the mortgagee by the mortgagor is not repaid by a certain day, with or without interest, as it may be, the sale shall become absolute. There is no title in the mortgagee until default occurs, and even then it is not complete as owner, for Regulation XVII of 1806 requires certain forms and a certain time before foreclosure can be legally had. Until the sale becomes absolute legally, the mortgagor is competent to deal with the property in any way he likes, so long as the rights of the mortgagee are not defeated. In foreclosure the mortgagee must serve notice on the mortgagor or his legal representative, which includes every one who claims an interest in the mortgaged property. It may be said that the mortgagor in alienating the property cannot pass more than his own interest, which is the right to redeem it from the mortgagee. But he has never parted with the ownership of the property, and under a purely conditional deed of sale the mortgagee has no right to possession. The transferee buying the equity of redemption buys the still surviving ownership that has not passed to the mortgagee. On redemption there is no reconveyance by sale to the mortgagor. The deed of conditional sale was given to the mortgagee as security for his money ; that repaid to him within the terms of the contract, or within the period

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allowed by law, the original transaction is at an end. Should there be default, the original transaction of a mortgage with conditional sale is converted into one of absolute sale. The ownership then passes from the mortgagor to the mortgagee, and what was originally only a condition to sell becomes for the first time an absolute sale. The Regulation referred to extends the period within which redemption may be had beyond the stipulated period of redemption, thus delaying the completion of the mortgagee's title, which, but for the Regulation, was acquired when default first occurred. But the mortgagee cannot even insist upon a strict performance of the contract between himself and the mortgagor. S. 8 provides that "whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale *conclusive* on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition &c. &c. &c." As a result, if the property be not redeemed within one year from the date of the notification required after the petition has been presented, the mortgage is finally foreclosed and the conditional sale becomes conclusive, and the title of the mortgagee as owner dates from the end of the year within which the mortgagor may redeem. In 1865 the Judicial Committee of the Privy Council stated in *Forbes v. Amir-un-nissa Begam* (1) at length what "in their Lordship's apprehension the law of foreclosure, as established by the Regulations and the practice of the Courts in Bengal, is." The entire law on this subject is to be found in this decision. The Bengal law has been embodied in the Regulations in force in these Provinces. The learned Pandit Ajudhia Nath, in support of the judgment of the lower appellate Court, quotes as the leading authority on the question referred to us the decision of the Sudder Dewanny Adawlut of these Provinces in *Beharee Lall v. Subkaran Rai* (2), to which the referring Judges allude. This decision very clearly ruled that it was not necessary for a pre-emptor to raise his claim against a stranger in whose favour a deed of conditional sale has been

(1) 10 Moo. Ind. App., 340. (2) 10 N.-W. P. S. D. A. Rep., 588.

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executed until the sale became absolute. The decisions of the Sudder Dewanny Adawlut and of this Court may be said to have perhaps universally followed this ruling up to a late date. The Pandit referred to numerous precedents. On the 6th September, 1859 (1), the Judges followed the ruling referred to above. In 1860 (29th August)—*Khadim Ali v. Rajoonain Rai* (2)—it was admitted that, on a sale becoming absolute, a new cause of action accrued to the pre-emptive claim. This decision is cited in the referring order. On the 12th November, 1862,—*Hira Ram v. Ram Lall Singh* (3)—it was held again that the right of pre-emption could not be regarded as having arisen before steps for foreclosure were taken by the vendee. The leading case was distinctly followed by a Division Bench of this Court in 1867 in *Rudhey Pandey v. Nand Kumar Pandey* (4), in which it was laid down, regarding the suit of the plaintiff, that “it was admittedly and undoubtedly brought within a year from the date on which the vendee, whose purchase is sought to be set aside, obtained actual possession of the property, to which his title originally conditional had become absolute in execution of a decree passed in his favour against the auction-purchaser of the rights and interests of the conditional vendors.” The decision then passes to another point, and it is observed that it was “not pretended that the property in question had, before the conditional sale aforesaid or at any other time, been offered in compliance with the terms of the settlement compact to the plaintiffs and been refused by them: it follows that they are entitled to a decree.” With the point suggested in this latter portion of the judgment I will deal presently, inasmuch as it is one of the arguments used in the case before us against the pre-emptive claim. In 1870 the rulings of this Court in 1855 and in 1867 were again followed by a Division Bench of the Court in the case of *Baddri Dass v. Durga Parshad* (5). It was observed in that case that it had been ruled by the Court repeatedly that limitation should run in cases of the nature involved in the suit from the expiration of the year of grace, and it was held that a party claiming the right of pre-emption in respect of property the subject of a

(1) 14 N.-W. P. S. D. A. Rep., 282.

(2) 15 N.-W. P. S. D. A. Rep., 557.

(3) N.-W. P. S. D. A. Rep., 1862,
vol. ii, p. 175.(4) N.-W. P. H. C. Rep., 1867,
p. 364.(5) N.-W. P. H. C. Rep., 1870,
p. 284.

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conditional sale is bound to make his claim on the expiration of the year of grace mentioned in the notice of foreclosure. So far it will be observed that the rulings of the Sudder Dewanny Adawlut and of this Court have been consistently opposed to the view taken by the learned Judges in the two cases already noticed by the referring Judges. The Presidency rulings have been in accordance with those of the Sudder Dewanny Adawlut and hitherto of this Court. On the 27th February, 1865, it was held by a Full Bench (Bayley, J., *dissentiente*)—*Gurdial Mundur v. Teknarain Singh* (1)—that no right of pre-emption arises on a mere conditional sale or mortgage whilst any right of redemption remains in the mortgagor. It was also held that it was immaterial whether a formal demand of pre-emption was made at any other time than after the sale became conclusive. The ruling was on a claim for pre-emption under the Muhammadan Law, but the principle is the same as in the case of the conditional sale before us. So again in 1866 a Division Bench of the same Court held in *Syud Amir Ali v. Bhaho Sundaree Debia* (2) that a party claiming pre-emption in respect of the property the subject of a conditional sale is bound to make his claim on the expiration of the year of grace mentioned in the notice of foreclosure. Again on the 30th April, 1867, it was ruled in the case of *Mohunt Ajudhya Pooree v. Sohan Lal* (3) that “the fulfilment of the condition of the *kut-kabalah* and determination of the year of grace completed the sale, and that, as soon as the pre-emptor became aware of that fact, he ought to have preferred his claim.” These two are Muhammadan cases, but as has been observed above the principle is applicable to the case under review. I need not dwell upon these Muhammadan cases at any length so far as they appear to hold that as long as there is a power to redeem so long there has been no sale. What does or does not amount to a sale under that law is a different question, but we have not to consider the Muhammadan Law with reference to the case referred to us, in which the claim is based upon the village administration-paper. Before considering the general terms of the administration-paper, I would notice an argument used during the hearing, that, the foreclosure had according to law,

(1) 2 W. R. 215. (2) 6 W. R. 116.
(3) 7 W. R. 428.

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the sale when declared absolute is one that is obligatory under a decree and not a voluntary sale, within the meaning of the words "if any sharer intends to transfer." This argument, however, will not I think hold good. The circumstances of a sale in execution of a decree of Court, and the circumstances under which a mortgage is foreclosed and a sale becomes absolute, are not similar. A sale in execution of a decree against the shareholder is a compulsory sale, and one certainly that can in no sense be regarded as a voluntary transfer on the part of the judgment-debtor of his share in a co-parcenary estate. The mortgage by deed of conditional sale was a voluntary transfer; the foreclosure is the consequence of the mortgagor's failure to redeem the mortgage. He might have redeemed it, if he liked or had the money. If he had no intention or expectation at the time of mortgage of being able to redeem it, the foreclosure on his default is the result of his own act when he executed the deed of conditional sale. In the leading case of 1855 the Judges say:—"The proceedings of the Civil Court, in the matter of foreclosure, were purely ministerial, not judicial; no authoritative enforcement of the sale was made by the Civil Court; the sale became absolute solely in consequence of the omission of the vendor to deposit the amount due under the deed of conditional sale within the year of grace, agreeably to the notification issued by the Judge, at the instance of the mortgagee, under the provisions of s. 8, Regulation XVII. of 1806." This ruling of the Court was not new, for as far back as 1813 the functions of the Judge in foreclosure proceedings were notified by Circular Order dated 22nd July, 1813, as being purely ministerial and the ruling in the judgment by the Privy Council in *Forbes v. Amir-un-nissa Begam* (1) confirms this view. The words of the Judicial Committee are as follows:—"The general effect of these Regulations is that, if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *a fortiori*, if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, s. 8, are

(1) 10 Moo. Ind. App. 340.

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purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession, if he is out of possession, or to obtain a declaration of his absolute title if he is in possession." The result is that the title as owner of the mortgagee begins when the right of redemption has gone. It is not created by any compulsory decree of Court, though the law requires that it should be completed by a suit, in which any question as between the mortgagor and mortgagee is set at rest for ever.

Now as to the terms of the administration-paper which refer to priority of claimants, they are as follows:—"If any sharer intends to transfer his share, his near relative shall have the first right (of pre-emption): then the shareholders in another patti: if all those refuse to purchase, the intending transferer shall have the power to sell and mortgage &c. &c. &c. to whomsoever he likes." It was contended by the defendant that before the mortgage, and before effecting foreclosure of the property mortgaged, he had offered the share to the plaintiff and other shareholders. But this contention is no longer open. Whether he did or did not offer the property, as he says that he did, is a question of fact. On this point the lower appellate Court held that it had not been proved that the plaintiff was offered an opportunity of acting on his right of pre-emption, but had declined to do so. The lower appellate Court distinctly finds that there was no such refusal on his part as would incapacitate him from asserting his legitimate right in Court as he has done, and this finding is a proper one, with reference to the determination of the first Court on the issue, which was that the plaintiff was willing to purchase, paying down the principal with interest at Re. 1-6-6 per cent., but declined to pay compound interest. It was a fair question for the Court to determine whether or not he was liable to pay compound interest. Now I will consider the contention of appellant that any right of pre-emption that the plaintiff may have had in 1871, when the property was conditionally sold, has been forfeited by his not having asserted his claim in that year. The plaintiff replies to this contention that the terms of the administration-paper entitled him to an offer alike on the execu-

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tion of the deed of conditional sale and when it became an absolute sale. The words of the administration-paper are certainly not opposed to the plaintiff's argument. "Transfer" includes all sorts of alienation, and it is upon a refusal of any transfer that the transferer may sell or mortgage to any one. But it does not follow that, if the intention of the shareholder is to mortgage his property, the co-sharer who might be ready to buy it should come forward and claim the mortgage, or if he did not should forfeit his right to buy the share when it was absolutely sold. Such a contention will not, I think, hold good, and I find that the Sudder Dewanny Adawlut in 1855 took the same view. The Judges say: "The Court cannot concur with the Principal Sudder Amín in opinion that it was imperative on the appellaut to claim his preferential right at the time of the execution of the deed of conditional sale, and that, having failed to do so, he is not competent to assert a right of pre-emption on the conditional sale becoming absolute. On the contrary, they hold that it was optional with the appellant to put forward his claim under the terms of the *wajib-ul-ars* at whatever stage of the transaction he might prefer. He was indeed at liberty to assert his right to take the place of the mortgagee, had he thought proper to do so, but the same opportunity was subsequently presented when the mortgage was converted into a sale. The appellant might not object to a temporary occupancy by a stranger, but he might be opposed to the permanent and irrevocable transfer to a stranger." In this view I concur altogether, and I think that the opinions above expressed dispose of the first and second grounds in the memorandum of appeal. The third ground, as already observed, is a question of fact, which cannot be re-opened in second appeal. The lower appellate Court found that there was no such refusal on the plaintiff's part as would incapacitate him from asserting his legitimate right in Court as he has done, the question before the Court being the proper amount of consideration which plaintiff should pay the defendant-purchaser. From this it is evident that plaintiff was willing to pay whatever sum the Court should find to be really due by him to the mortgagee, a question, however, which involved a dispute regarding compound interest claimed by defendant. As to the Fourth ground of appeal, we have now to deal with the

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question of limitation. Looking to Act XV of 1877 for guidance, art. 10 of sch. ii provides one year from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold. The Courts below have found that physical possession was obtained by the purchaser on the 9th September, 1878, and the suit was instituted on the 1st September, 1879. The claim clearly is not barred. As to the 5th and 6th grounds of appeal I see reason to differ from the lower Courts in their finding as to the sum due to the defendant, and in their refusal to allow him compound interest. The vendee contends that he is entitled to receive Rs. 912-3-0, the amount mentioned in the notice of foreclosure, on which his mortgage was foreclosed and he obtained a decree on the 16th April, 1878. The Judge remarks that this decree was an "*ex parte* decree," and while it decreed proprietary possession of the property in suit by foreclosure of mortgage, it did not expressly say that this was done in lieu of the sum in the foreclosure notice, *viz.*, Rs. 912-3-0; that question was not raised, and it was therefore open to the Court in the present suit to go into the matter. But the terms of the deed of sale allow of compound interest under certain conditions. I see no reason to doubt that the mortgagor, had he redeemed, would have been bound to pay the interest according to the terms of the bond, notwithstanding the ruling of the Court in the case cited by the first Court,—*Lachman Singh v. Pirbhu Lal* (1). For in that case a higher rate of interest on breach of the conditions of the bond was properly regarded as a penalty. But in this case the rate of interest is not raised by the conditions of the deed on the occurrence of default in payment of interest; the rate remains the same; and it has been held that it is raising the rate of interest after a breach which constitutes a penalty. What the mortgagor would have had to pay to redeem the property, the pre-emptor may be reasonably called upon to pay if he takes it from the mortgagee, when the mortgagor fails to redeem it. I may add that no question of fraud has been introduced into this part of the case. It is not as if the mortgagee had fraudulently at the time of foreclosure and in collusion with the mortgagor made an incorrect and false account in order to deceive the claimant, and debar him from

(1) N.-W. P. H. C. Rep., 1874, p. 358.

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asserting his pre-emptive right. I think therefore that the defendant is entitled to compound interest up to date of foreclosure, but that afterwards he should not be allowed compound interest, but simply interest at the rate named in the bond, and from the date of suit until the time allowed by the Court for the pre-emptor to deposit the purchase-money at the rate of twelve per cent.

I would modify the decree of the lower appellate Court in accordance with the views expressed above, and would dismiss the appeal with costs.

OLDFIELD, J.—A deed of 12th May, 1871, was executed by one Bansi in favour of Alu Prasad, by which a mortgage by conditional sale was effected of a share in mauza Narsinghpur. Foreclosure having taken place in 1877, Alu Prasad brought a suit for possession and obtained a decree, and in its execution possession was given on the 9th September, 1878. The plaintiff in this suit is a co-sharer in the thoke and has brought this suit to enforce a right of pre-emption under the terms of the *wajib-ul-arz* on the conditional sale becoming absolute. The main question is whether, under the terms of the *wajib-ul-arz*, he can assert any right of pre-emption on the sale becoming absolute, or whether the only right he possessed was a claim to have an offer made to him of the mortgage by conditional sale which the deed of the 12th May, 1871, effected; and this question can only be decided with reference to the terms of the contract entered into in the *wajib-ul-arz* and the intention of the contracting parties.

It appears to me that it was intended that a co-sharer should have an offer made to him of all transfers, whether by mortgage or sale, before they could be made to strangers. In the case before us there was no doubt only a single contract between the parties to the deed of the 12th May, 1871, but this contract operated to transfer distinct interests in the land which was the subject of the contract, one by way of mortgage, the other of sale, to both of which transfers the right under the *wajib-ul-arz* would, I consider, attach, for the right which the shareholders have under the *wajib-ul-arz* is not dependent on the form of a contract, but on its operation in transferring property. The main object the parties to the *wajib-ul-arz* had was to prevent property from passing to

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strangers, and this would be defeated if in the case of mortgage by conditional sale the right to pre-emption did not arise on the sale becoming absolute. It might be in the interest of a co-sharer to take a transfer by sale in order to prevent property passing absolutely to a stranger, while he would be indifferent to its transfer by way of mortgage. A long course of decisions has recognised the right of pre-emption on sales being made absolute after foreclosure, and although when the right is based on contract in the *wajib-ul-arz* each contract must be judged separately, yet such contracts are usually similar in character, all having the same object, to preserve the property in the hands of the co-sharers. The other grounds of appeal have no force. The appeal should be dismissed with costs.

STRAIGHT, J.—The plaintiff claims to obtain possession of the property in suit, by enforcement of his pre-emptive right, against one Bansi a co-sharer, vendor, and Alu Prasad a stranger, vendee, defendants. He asserts this right, as based upon a contract between himself and the other co-sharers in the mauza, contained in the *wajib-ul-arz* of the 15th April, 1863. The precise obligation or duty thereby created was as follows:—"When a co-sharer desires to transfer his share, a near relative shall have the first right: next the co-sharers in the other pattis: if all these refuse to take, the vendor shall have power to sell and mortgage to whomsoever he likes." Taking this entry in its entirety, I think it should be read as if, after the expression "transfer his share," the words "by sale and mortgage" followed; and that in the community governed by the provisions of this *wajib-ul-arz* there was a right of pre-emption, either upon mortgage or sale of a share, or both. There was accordingly an obligation or duty imposed upon every share-holder, before incumbering or parting with his share or any portion of it, to give his co-sharers, in the stipulated order, the opportunity of becoming the mortgagee or purchaser. The main question therefore involved in the present suit is whether, having regard to the terms of the *wajib-ul-arz*, and the right given by it to the plaintiff on the one hand, with the concurrent duty and obligation created in the defendant Bansi on the other, the latter was at any time subsequent to the 12th May, 1876, in a position

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to make an offer of the share for sale. The cause of action now sued upon is alleged to have accrued on the 9th September, 1878, the date when the defendant-vendee Alu Prasad, by virtue of his *ex parte* decree, obtained in execution possession of Bansi's share. No claim is preferred by the plaintiff on the basis of a right of pre-mortgage, and if there had been, it would have been difficult to hold that art. 10, sch. ii, Act XV of 1877, was applicable. The suit is therefore one for enforcement of a right of pre-emption by impeachment of the sale under which Alu Prasad the defendant vendee has taken physical possession of the property. Much turns upon the interpretation or construction to be placed upon the word "sale," that is to say, upon determining the point at which the share of Bansi became sold so as to affect the pre-emptive right of the plaintiff. It is necessary to examine the terms of the contract entered into between Bansi and Alu Prasad on the 12th of May, 1871. By the instrument then executed Bansi mortgaged his one anna four pies share in mauza Narsinghpur to Alu Prasad for Rs. 300. The principal amount with interest was to be paid within five years. The interest was to become due and payable at the end of every six months at the rate of Re. 1-6-6, and upon failure to pay compound interest was to be calculated at the expiry of the five years. It was further provided that the entire amount of the mortgage "shall be repaid at the time stipulated, and if I fail to pay, then this very deed of mortgage will stand as the sale-deed, and I shall get my name expunged from the revenue records." It seems clear from this document that, during the currency and down to the last day of the five years, Bansi retained all the rights of an ordinary mortgagor, in their widest and most comprehensive sense. It was perfectly competent for him, at any time during the period, to dispose of his interests, nor could his mortgagee have refused to allow the debt due to him to be paid off by any person to whom Bansi had transferred that interest. Whatever it was that he had to sell could of course only have been taken by a purchaser subject to the lien created by the deed of the 12th May, 1871, and no possession could have been had by a purchaser except upon satisfaction of the charge held by Alu Prasad. The Regulation of 1806 makes it clear that a transaction of the kind recorded in the instrument executed by Bansi to

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Alu Prasad must be regarded as a mortgage, and that the rights of the mortgagor must be taken to have continued in existence until the expiration of the year of grace from the date of the notice of foreclosure, when what had hitherto been merely a contract of pledge resolved itself into a contract of sale. The further proceedings that thereupon ensued were simply matters of ministerial action on the part of the Court having cognizance of the matter. At what point then can it be said that there was such an absolute transfer of his share by Bansi to Alu Prasad as broke the obligation due from him to the plaintiff under the *wajib-ul-arz*; or in other words, when should Bansi have offered to sell his share to the plaintiff? It cannot be said that this duty arose on or before the 12th May, 1871, because the transaction at that time with Alu Prasad amounted to nothing more or less than a mortgage, and so it continued until the 22nd of September, 1877, when by the terms of the contract and operation of law what had hitherto been purely a mortgage-deed became a deed of sale. If then the transaction bore this character down to the date mentioned, it would be inequitable to hold that Bansi could so shape the instrument of mortgage as by its terms to render the assertion of preemptive right by his co-sharers impossible, for the result of this would be that he could say, "I did not offer to sell to your on or before 12th May, 1871, because at that time no sale, in the sense of the *wajib-ul-arz*, was contemplated," or at the late stage, "I did not offer to sell during the five years or the year of grace because, though the property was conditionally sold, the *wajib-ul-arz* contained no provision in respect of such a transaction. Were it competent for Bansi to take up such a position, the practical result would seem to be that the right of pre-emption could never be asserted against a conditional sale; and further, assuming that the instrument of the 12th May, 1871, recorded nothing more than a mortgage, then, if the terms of the *wajib-ul-arz* are to be taken in their strictness, it would not have been correct for Bansi to offer his share to the plaintiff for conditional mortgage or sale, because neither one nor the other is mentioned in it. Upon the whole, and having given the matter the best consideration I can, it appears to me that the deed of the 12th May, 1871, must be taken to have had two characters, immediate of a mortgage, deferred of

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a sale ; and in my opinion it was competent for Bansi to offer to sell his share to the plaintiff at any time after the date of its execution down to the last hour of the last day of the year of *graca*. No doubt from and after the 22nd September, 1877, the mortgagee's title so far as the foreclosure was concerned was clear, though it must not be forgotten that Alu Prasad, being out of possession, had in order to make himself perfectly secure to bring a suit for a declaration of his right to and possession of the property pledged. The use of the term "conditional sale" is somewhat misleading, for it in point of fact only describes an hypothecation of land as security for a loan. The term "vender" and "vendee" have no special virtue or force, and it would be as accurate to call the one "mortgagor" or "pledger" and "mortgagee" or "pledgee." The real nature of the transaction cannot be altered by the application of any technical terms to it, and all that Bansi did in reality was to pledge his share without possession for a loan, with a stipulation that, if he did not repay the advance within five years, his pledgee should be at liberty, after giving him a year's grace within which to discharge his obligation, to use the machinery of the law to convert the pledge into a sale. No doubt, subsequently to the deed of the 12th May, 1871, down to the 22nd September, 1877, the character of the interest remaining in Bansi was in legal phraseology the equity of redemption, but so long as that continued in existence so long had he the command of his mortgagee, whom he, or any assignee of his right, might buy out. Suppose for a moment in the present case that, instead of Alu Prasad enforcing his mortgage by foreclosure and obtaining a declaration of his right to and possession of the share of Bansi by separate suit, Bansi had disposed of his interest to a third party who had paid Alu Prasad off and taken the property, would such a sale have been one that the plaintiff could have impeached on the basis of his pre-emptive right? I am of opinion that it would, and that, though such a transaction might not fall within the precise terms of the *wajib-ul-arz*, it would certainly come within its spirit and the intention of those who were parties to it. To hold otherwise would put Bansi in the position of enabling the vendee of his equity of redemption to redeem his share from the charge upon it, and so to become the owner and

proprietor of such share, thus defeating the object of the *wajib-ul-arz*, namely, the exclusion of strangers. The only difference in the present case is that, by the default of the mortgagor and operation of law, a transaction which to a particular date existed only as an hypothecation of land upon that date was converted into a sale. But a mortgagor, having full knowledge that an hour must arrive when all his rights and interests as mortgagor will be absorbed, and when his mortgagee will become his vendee, does not appear to me to be in a different position to one, who, having entered into a contract to sell his equity, knows that upon the execution of the instrument of transfer such equity is parted with by him. In either case he is perfectly well aware that a time certain must arrive, when, either voluntarily or compulsorily, his rights and interests vest in another person. It seems to me, therefore, that, having regard to the terms of the *wajib-ul-arz* and the spirit and intention obviously dictating them, it was incumbent upon Bansi, both before the execution of the deed of 12th May, 1871, and prior to the termination of the year of grace, to make an offer to the plaintiff, and that the present suit is therefore maintainable. In coming to this conclusion, I regret to find myself constrained to form an opinion at variance with the views I expressed in concurrence with Pearson, J., in *Lachman Prasad v. Buhadur Singh* (1), the decision in which, however, I am glad to think, can be upheld on independent grounds.

In this reference to the Full Bench the appeal itself has been submitted for disposal, and with respect to this I would only add that I approve of the modification of the decree of the lower appellate Court as proposed by Spankie, J. The appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

RAM KIRPAL SHUKUL (APPELLANT) v. RUP KUAR (RESPONDENT).*

Appeal to Her Majesty in Council—Final order passed on appeal by the High Court on a question mentioned in s. 244 of Act X of 1877 (Civil Procedure Code)—Act X of 1877, ss. 595, 596.

An order passed on appeal by a High Court determining a question mentioned in s. 244 of Act X of 1877 is a final "decree" within the meaning of s.

* Application No. 15 of 1880, for leave to appeal to Her Majesty in Council.

(1) I. L. R., 2 All. 884.

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595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that notwithstanding the value of the subject-matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J., arising out of an application made to them for leave to appeal to Her Majesty in Council from an order made by them relating to the execution of a decree, in the exercise of the appellate jurisdiction of the High Court, on the 10th August, 1880. This application was referred by those learned Judges to the Full Bench. The facts of the case and the point of law arising therein are stated in the judgment of the Full Bench.

Munshi *Hanuman Prasad*, Lala *Lalta Prasad*, and Maulvi *Mehdi Hasan*, for the applicant.

The *Senior Government Pleader* (Lala *Juala Prasad*), the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Full Bench was delivered by

STRAIGHT, J.—This case originally came before a Division Bench of this Court, as a second appeal from an order of the Judge of Gorakhpur made in certain proceedings in execution, under a decree of the Sudder Dewanny Adawlat, dated the 23rd June, 1864. Applications had been regularly made from time to time to execute this decree for mesne profits, and they had been granted, the latest of them being allowed by the Munsif on the 10th May, 1879, when the total amount declared to be recoverable under this head was Rs. 16,233-0-7. Upon the hearing of this last application, objection was taken by the judgment-debtor that the original decree did not give mesne profits, but the Munsif was of opinion that, as this objection had been urged by the judgment-debtor in an earlier application and decided against him, the matter was *res judicata* and could not be re-opened. An appeal was preferred to the Judge; but he, entertaining a like view, upheld the decision of the Munsif. The judgment-debtor then appealed to this Court, and the Division Bench before whom the case came, being of opinion that a point of considerable importance was raised, referred to the

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Court at large the question whether the provisions of s. 13 of the Civil Procedure Code were applicable to proceedings in execution. The Full Bench were unanimously of opinion that the principle of *res judicata* did not hold in the execution department; and, fortified by this decision, the Division Bench subsequently disposed of the appeal, and on the 10th August, 1880, determined it in favour of the judgment-debtor, appellant, on the ground that the decree of the 23rd June, 1864, did not give mesne profits. From this decision the judgment-creditor now applies for leave to appeal to Her Majesty in Council, and the simple question is whether, under the terms of ss. 595-596 of the Civil Procedure Code, such an appeal lies. It is admitted that the subject-matter of the suit in the Court of first instance, namely, the property possession of which was sought, was considerably under the value of Rs. 10,000. But it is contended on behalf of the judgment-creditor that the decree from which he seeks to appeal is that passed by this Court on the 10th August, 1880, which directly involves a question respecting property of the value of Rs. 10,000. If s. 2 of the Civil Procedure Code as amended by Act XII of 1879, in its definition of decree, is applicable to the chapter relating to "Appeals to the Queen in Council," the order of this Court, although passed in a miscellaneous proceeding, would be a final decree passed by this Court in the exercise of its final appellate jurisdiction. But even if s. 594 alone has to be considered, it cannot be said that the decision of this Court upon an appeal relating to questions raised in execution under s. 244 of the Civil Procedure Code is not a decree. It therefore appears to us that the objection that the subject of the suit in the Court of first instance was below the value of Rs. 10,000, has no force. It is not the decree of the Sudder Dewanny Adawlat of 23rd June, 1864, which is sought to be appealed to Her Majesty in Council, but a final decree of this Court, passed in the exercise of its final appellate jurisdiction on the 10th August, 1880, which directly involves a question respecting mesne profits to the amount of Rs. 16,233-0-7. We would therefore grant the application as prayed, and allow the appeal to Her Majesty in Council to be preferred.

Application allowed.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ABDUL RAHMAN AND OTHERS (DEFENDANTS) v. YAR MUHAMMAD AND OTHERS (PLAINTIFFS).*

Arbitration—Remission of award—Refusal of arbitrators to reconsider it—Appeal impugning propriety of order of remission—Act X of 1877 (Civil Procedure Code), ss. 520, 521—Mosque—Right to sue—Worshipper.

An award was remitted under s. 520 of Act X of 1877. The arbitrators refused to reconsider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under s. 520. *Held* that the question whether the award had been properly remitted under s. 520 or not could be entertained in such appeal.

The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers in entering or leaving such mosque.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellants.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi Hanuman Prasad, for the respondents.

The following judgments were delivered by the Court :—

SPANKIE, J.—Yar Muhammad and others, plaintiffs, residents of mohalla Madanpura in the town of Benares, aver that there is a “*Jahāngīrī masjid*” in the mohalla to which are attached a “*hujra*” or small room, and a “*saiban*” or hall. These appertain to the mosque and were from ancient times used by travellers, and also by the “*mutwali*” or superintendent; the furniture of the mosque was kept in the apartments. On the 5th June, 1879, the defendant Abdul Rahman and two others wrongfully took possession of both apartments, turned out Mahmud Bakhsh, the “*mutwali*” referred to above, from the small room, and have occupied the rooms ever

* Second Appeal, No. 1092 of 1880, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 15th September, 1880, reversing a decree of Babu Mirtonjoy Mukarji, Munsif of Benares, dated the 8th April, 1880.

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since as shops. The plaintiffs, as residents of the mohalla and worshippers at the mosque, pray that the defendants may be ejected from both rooms ; that the materials and stock of the shops may be removed ; and that the defendants may be restrained from using the rooms in future as shops. The material part of the contention made by the defendants was that plaintiffs had no connection with the mosque to which the rooms are said to be attached ; they have never had any possession of these rooms, nor was Mahmud Bakhsh the *mutwali*, nor had he ever any possession of the rooms, whereas defendants have always from ancient times been in possession of the rooms, and have used them as shops ; the mosque was built by their ancestors, and is within the enclosure in which their house stands ; the rooms were built long after the mosque, in the vicinity of the house and mosque, but they never belonged to the mosque, or were used as a store-room for the furniture of the mosque ; no *mutwalis* ever lived in them except defendants and their ancestors who have been and are superintendents of the mosque, but even if these rooms appertained to the mosque, there would be no impropriety in occupying them as shops. The Munsif found that the defendants and their ancestors from the earliest times within the memory of living persons had been in possession of the mosque, and in the absence of reliable evidence to the contrary, it might be inferred that the mosque was the private property of the defendants ; the rooms had been rebuilt thirty years prior to the suit by the ancestors of the defendants. The Munsif also held, upon the evidence of learned Muhammadans and authorities cited, that, though the rooms might be by position appurtenances to the mosque, still they were not indispensable ; the mosque would be nevertheless a mosque, if the rooms had no existence ; the indispensable appurtenance (*ferai masjid*) to a mosque was its court-yard (*sahan*) ; but these rooms were not appurtenances proper to the mosque, and what it would not be right to do in the mosque and its court-yard would be allowable in other appurtenances ; under any circumstances the suit was barred by the adverse possession of the defendants for more than twelve years. The Munsif dismissed the suit. In appeal, on the agreement of the parties, the Judge referred the case to arbitration. The record was returned by the lower appellate Court under the provisions of s. 526 of Act X of

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1877 to be reconsidered by the arbitrators. Two of the arbitrators were in favour of the defendants and one in favour of the plaintiffs. But both parties objected to the award of the majority. On this account and for other reasons the case was sent back to the arbitrators, who, however, refused to reconsider their award. Upon this the Judge determined the case on the merits. He held that the suit was not barred by limitation; that the mosque was a public place of worship; that the defendants were simply superintendents and managers of the mosque; that the plaintiffs were competent to maintain the suit; that the rooms were built in the same style as the mosque, and were attached to it, and access to them could only be had over the pavement in front of the mosque; and that, looking to all the circumstances of the case, there could be no doubt that all Muhammadans, who have strict opinions on the subject of their religion, would regard the appropriation of the rooms in suit for purposes of trade, or lay work, as highly improper. He therefore decreed the appeal and the claim of plaintiffs in full, and reversed the decree of the Munsif with costs.

It is contended in second appeal by the defendants (i) that the decree was bad because the award of the majority was good, and not open to objection on any of the grounds which permit a remission for reconsideration; (ii) that the decree was bad because the plaintiffs not being recognised representatives of the public were not competent to bring the suit; (iii) that the Judge had not considered the plea that the mosque appertained to the private dwelling house of the defendants, and the rooms were built and occupied by the defendants and their predecessors; and (iv) that the decree was bad, because the rooms were no part of the mosque, and there was nothing objectionable in their use for trade.

There is no doubt that the parties agreed to abide by the opinion of a majority of the arbitrators. All three arbitrators were agreed that the suit was not barred by limitation; that the building was a public mosque; that the small room and hall were appurtenances of the mosque; and that the defendants and their ancestors had no higher possession than that of managers and superintendents. But the majority of the arbitrators held that trade might be carried on in the rooms in dispute, and there was

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no reason for removing the defendants from their office in the mosque; but they added that the trade was not unjustifiable "provided it does not become necessary to open a passage to and from the mosque; as the court-yard of the mosque is used as a passage to and from the building in suit, it is not proper that purchasers, who consist of persons of all descriptions, should use the pavement of the mosque as their passage, which should therefore be totally stopped." Their order maintained the possession of defendants as superintendents of the mosque, and directed "them to put a total stop to the pavement of the mosque being used as a passage by purchasers." Both parties objected to this award, and the defendants in whose favour it was made urged that the order regarding purchasers not being permitted to use the pavement of the mosque as a passage was opposed to the claim and relief sought, and they prayed that that portion of the award might be amended under s. 518 of the Civil Procedure Code. The Judge considered that, as the award of the majority held trade to be lawful in the rooms in dispute, which were appurtenances of the public mosque, that part of their decision which forbade purchasers from having access to the rooms over the pavement of the mosque, the only means of entrance to those buildings, was inconsistent, indefinite, and incapable of execution, being likely also to promote a breach of the peace, and he accordingly remitted the award under cl. (b), s. 520 of the Code. It is hardly consistent with the objections taken below by the defendants that they should now complain of the award being remitted for reconsideration on the very point which was the subject of their dissatisfaction. True, they prayed that action might be taken under s. 518 of the Code, and had this been done there would have been an appeal under s. 588 (26) of the Code. But the Court in the exercise of its discretion remitted the award under cl. (b) of s. 520. The order remitting the award is not appealable as an order. It is open to doubt whether, when a decree has been made, we are competent to consider in second appeal whether or not the Judge has rightly exercised his discretion. The opening words of s. 522—"If the Court sees no cause to remit the award on any of the matters referred to arbitration for reconsideration in manner aforesaid"—seem to indicate that the

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Court is not fettered in the exercise of its discretion. The appeal now before us is under s. 584 of the Code, and is from the decree on the merits of the case, the award having become null and void under s. 521, in consequence of the refusal of the arbitrators to reconsider it. If one can look behind the decree and consider the propriety of the order remitting the award for reconsideration, one can only do so under cl. (c), s. 584 of the Code, and I think this very questionable. It would be difficult to say in this particular case, certainly in which both parties objected to the award, and the defendants on the very point which led to its remission to the arbitrators, that the exercise by the Judge of the discretion allowed to him had "possibly produced error or defect in the decision of the case on the merits." But I do not care to press this point, for this Court has in Full Bench allowed the propriety of an order under this section to be considered—*Nanak Chand v. Ram Narayan* (1)—and I was myself a party to the decision. There was, however, no discussion in the case as to whether we could or could not look at the order; that we could do so appears to have been unquestioned. As far as the first plea is concerned, I see no reason to doubt that the lower appellate Court acted within its powers in remitting the award. The Judge has pointed out the difficulty likely to arise when the award is acted upon, and he appears to have exercised his discretion aright in bringing the case within cl. (b), s. 520. As to the second plea, I have no doubt that the plaintiffs were competent to sue. I expressed a similar opinion in S. A. No. 860, decided on the 8th January, 1877 (2), that a heretofore worshipper at a shrine in the town in which he resides would have a right to call in question the conduct of the manager; and suits of a similar nature have been entertained in this and other Courts. It was held recently that worshippers or devotees of an idol are entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple.—*Radha Bai Kom Chimuji Sali v. Chimmaji* (3) It is sufficient to be a worshipper. The mosque in suit is a public one, and used by the residents of the mohalla: the plaintiffs, who use it for the purpose of worship, are

(1) L. L. R., 2 All., 181.

(2) Unreported.

(3) I. L. R., 3 Bom. 27.

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at liberty to restrain the defendants, being persons in charge of the mosque, from acts which they believe to be contrary to the intention or purpose for which the mosque and its rooms were built, or which are likely to obstruct or impede worshippers in their entrance to or exit from the mosque. The third and fourth pleas require no particular notice; the finding of the Judge is quite clear and one of fact, and the record bears full testimony that he comprehended and understood all the points of the case. I would dismiss the appeal, and so far affirm the decree with costs as to direct that the room be cleared of all stores or articles of trade, and the defendants be restrained in future from using the rooms as shops.

OLDFIELD, J.—The first question for decision is whether the Judge's order setting aside the award is fit to be maintained. The claim is to eject the defendants from two buildings appertaining to a mosque, which they had used as a shop, and to restrain them from so using the rooms. The suit was dismissed by the Court of first instance, and in appeal to the Judge, by consent of parties, the questions at issue were referred to arbitration, and the award of the majority of the arbitrators was that the rooms appertained to the mosque, that the defendants were the *mutwalis* or superintendents, that there was no objection to their using the rooms for purposes of trade, and while maintaining the defendants' possession the award directed them to put a total stop to the pavement of the mosque, that is, the court-yard, being used as a passage by purchasers between the mosque and the rooms. The Judge held that the decision in respect of the injunction as to the use of the platform was indefinite and incapable of execution: he also held the award to be contrary to public policy and calculated to provoke a breach of the peace, and he remitted the award for reconsideration, and as the arbitrators refused to reconsider it, he set it aside and disposed of the case on the merits. The defendants have now appealed. I consider we are competent to entertain this appeal, as it is only where a decree has been made in the terms of the award that no appeal lies; and in determining the appeal it is open to us to consider whether the award did become legally void by the refusal of the arbitrators to reconsider their award when directed to do so by the Judge;

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and this will depend on whether the Judge's order remitting it was one which he could legally make. S. 520 empowers the Court to remit an award for reconsideration upon certain grounds specified in the section, but upon no others; and by s. 521 an award remitted under s. 520 becomes void on refusal of the arbitrators to reconsider it. S. 520 gives no unreserved discretion to a Court in the matter of remitting awards for reconsideration; and the refusal of the arbitrators to reconsider the award will render it void only when the order remitting it was one which could be properly made under s. 520. It is therefore the duty of this Court on appeal to see if the order of the Judge was one which he could legally make under s. 520 so as to render the award void by refusal to comply with it. I am not prepared to hold that the Judge exceeded his powers in remitting the award for reconsideration, as the award does seem to disclose a ground under cl. (b), s. 520, and to be so indefinite as to be incapable of execution. It permitted the defendants to use the rooms attached to the mosque for the sale of goods, but at the same time put a duty on them indefinite in its nature and which they could not fulfil. As the court-yard of the mosque is the only means of access to the rooms, the restriction would virtually prohibit the use of the rooms by purchasers, and as the platform is used by all the frequenters of the mosque, it would be quite impossible to determine who amongst them were using it as purchasers; the injunction is thus indefinite; it is not clear what precise object the arbitrators had in view in making it, and it would either remain a dead letter or be an interference with the legitimate use of the platform. So far then the first objection in appeal fails. The second objection has no force. With regard to the third and fourth objections, there is no reason to interfere in second appeal with the findings of fact of the Judge as to the rooms being part of the mosque and the defendants having no right to use them for trade purposes. The plaintiffs have not established any right to eject the defendants who are *mutwalis*, but they have a right to have the rooms cleared of all stock and articles of trade, and to restrict the defendants from using them in future. I therefore concur in the proposed order of my honorable colleague.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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March 18.

BIKRMAJIT SINGH (DEFENDANTS) v. HUSAINI BEGAM (PLAINTIFF). *

Remand under s. 566 of Act X of 1877 (Civil Procedure Code)—Finding in favour of respondent who had not appealed or objected under s. 561—Right of respondent to benefit by such finding.

H sued *B* for arrears of rent, alleging that the annual rent payable by the latter was Rs. 212-1-0. The Court of first instance gave *H* a decree based on the finding that the annual rent payable by *B* was Rs. 94. *H* appealed, and the lower appellate Court gave him a decree based on the finding that the annual rent payable by *B* was Rs. 128-12-0. *B* appealed to the High Court from the lower appellate Court's decree. *H* did not appeal from that decree, neither did he take any objections thereto under s. 561 of Act X of 1877. STUART, C. J., and OLDFIELD, J., before whom such appeal came for hearing, remanded the case to the lower appellate Court for a fresh determination of the question as to the amount of the annual rent payable by *B*. The lower appellate Court then found that the annual rent payable by *B* was Rs. 212-1-0.

Held by STUART, C. J., (OLDFIELD, J., dissenting) that such second finding of the lower appellate Court should be accepted and the amount awarded by its decree be enlarged accordingly, notwithstanding *H* had not appealed from that decree or preferred objections thereto.

THIS was a suit for arrears of rent. The plaintiff asserted that the annual rent payable by the defendant, an occupancy-tenant, was Rs. 212-1-0. The defendant asserted that the annual rent payable by him was only Rs. 94. The Assistant Collector trying the suit found that the annual rent payable by the defendant was Rs. 94, and gave the plaintiff a decree in accordance with this finding. On appeal by the plaintiff the District Judge (Mr. G. E. Knox) found that the annual rent payable by the defendant was Rs. 128-12-0, and modified the decree of the Court of first instance accordingly. The defendant appealed to the High Court from the decree of the District Judge. The plaintiff did not appeal from that decree, neither did he prefer objections thereto under s. 561 of Act X of 1877. The appeal came for hearing before Stuart, C. J., and Oldfield, J., and those learned Judges, being of opinion that the District Judge had found that the annual rent

* Second Appeal, No. 16 of 1880, from a decree of G. E. Knox, Esq., Judge of Benares, dated the 30th September, 1879, modifying a decree of Syed Ali Hasan, Assistant Collector of the first class, Jaunpur, dated the 6th February, 1879.

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payable by the defendant was Rs. 128-12-0 without sufficiently inquiring into the facts of the case, on the 30th August, 1880, made an order remanding the case for the fresh determination of the question as to the amount of the annual rent payable by the defendant. In the meanwhile Mr. G. E. Knox had been transferred, and his successor, Mr. M. S. Howell, found, on the case coming before him under the High Court's order of remand, that the annual rent payable by the defendant was Rs. 212-1-0.

On the return of this finding the case again came before Stuart, C. J., and Oldfield, J., for disposal.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Hanuman Prasad, for the respondent.

The Court delivered the following judgments:—

STUART, C. J.—In our remanding order we expressed the opinion that the decision of the Judge (Mr. Knox) as to the amount of rent annually payable was not satisfactory. We further expressed the opinion that it was unsatisfactory to determine the rent payable now by the amount decreed more than twelve years before, without ascertaining why that sum had never been realized, by which we meant that Mr. Knox's view as to the effect to be given to the decree of 1863, by which he appears to regard the matter of that decree as showing in this suit a *res judicata*, could not be maintained. We therefore remanded the case for trial of the question indicated in our remanding order, and we have now got the finding on that remand by Mr. Howell, the present Judge and Mr. Knox's successor, who finds that the decree of 1863, if not conclusive, throws the burden of proving a less amount than Rs. 128-12-0 on the defendant, but who at the same time shows that the payments by the defendant have varied at different times. Thus he states that the defendant paid Rs. 128-12-0 or Rs. 129-7-0 according to different accounts in 1271 fasli; Rs. 110 in 1279 fasli; Rs. 114-6-0 or Rs. 116-10-0 in 1281 fasli, the reasons for the discrepancies being explained by the patwari. Mr. Howell's conclusion is that the defendant has all along been in possession of

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the land as tenant, but that up to 1273 he succeeded in concealing the extent of his holding, and before and after that date he has, like the other tenants, been systematically in arrears, and Mr. Howell's conclusion is that the rent payable on the defendant's holding is Rs. 212-1-0. I see no reason why we should not accept this finding. No doubt the plaintiff, to whom Mr. Knox had given a decree for Rs. 128-12-0, has not appealed from such decree, the present appeal being on the part of the defendant, who simply complains of having to pay more than Rs. 94. But it appears to me that the fact of the plaintiff not having filed a cross appeal, or recorded any plea or objection against the limited remedy given him by Mr. Knox, should not prevent us from doing full justice in the case by giving effect to the very distinct finding by Mr. Howell in answer to our remand. The absence in the record of any plea on the part of the plaintiff calling in question the inadequacy of the relief given by Mr. Knox may be attributable to *incuria* or a mere oversight on the part of his pleader and should not prevent us doing him justice. It is also to be observed that the plaintiff in his plaint distinctly asks the rent of Rs. 212-1-0, which Mr. Howell has found to be his due, and he reasserts that claim in his reasons of appeal, in which too it is shewn that the Rs. 128-12-0 was the amount of rent originally payable for 31 bighas 14 biswas, but the area of the holding having been enlarged to 51 bighas 17½ biswas the proper rent appropriated to such a holding was Rs. 212-1-0, being the amount claimed in the suit by the plaintiff and found by the Judge to be his due. Further, the objection to the finding on the remand filed by the defendant-appellant does not express any objection to the Rs. 212-1-0, but simply the contention that the defendant was not liable to pay an actual rent of more than Rs. 94. It appears to me therefore that, if we disposed of this appeal on any other view of the record than that I have explained, we not only do gross and manifest injustice, but we contradict and stultify our own remand order, which strongly declares that the judgment of Mr. Knox, which caused that remand, was unsatisfactory and legally erroneous, and yet we are now asked to rule that that unsatisfactory and erroneous judgment must now in the result be reverted to and accepted by us notwithstanding the careful inquiry and distinct finding by Mr. Howell stating us

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in the face. I cannot be a party to such an anomalous decision. I do not consider that the case falls under s. 561 of the Procedure Code. That section only applies to "a decree," that is, to a decree complete and final, and in that respect being discretionary and not directory, and not a decree such as we have in the present case under remand and therefore incomplete. Then the remand was accepted and acted upon by both parties, and there is no objection to the finding on remand on the ground of its being inconsistent with the record, of which on the contrary it forms part under s. 567 of the Procedure Code, and upon that record the appellate Court is not to look to the laches of parties and omissions in pleading, but "shall proceed to determine the appeal," that is, to determine the appeal upon the record as it stands with the evidence taken on remand and the finding thereon. The present difficulty therefore is one that has not been provided for and is simply a *casus omissus*, our duty being in my opinion under such circumstances to give effect to the plain demands of justice. For all these reasons I consider myself justified in accepting the finding of Mr. Howell on our remanding order and decreeing the plaintiff Rs. 408-14-0, and I would vary and enlarge Mr. Knox's decree accordingly, the costs of this appeal being borne by the defendant-appellant.

OLDFIELD, J.—We have now before us the finding on the issue remitted. The Judge after careful inquiry finds that up to 1272 fasli the defendant held 31 bighas 14 biswas of land, and that a decree for rent at Rs. 128-12-0 for this land was obtained against him, and that amount of rent has been paid on one occasion. The land was after 1272 fasli found to be in area 51 bigahs 17½ biswas for which the rent entered in the rent-rolls was Rs. 212-1-0, but it is questionable whether that amount has been agreed to and accepted between the parties. There is sufficient, however, to justify the Judge's (Mr. Knox's) decree which is based on the amount of rent payable being Rs. 128-12-0 per annum. In the absence of any appeal or objections by the plaintiff to the amount decreed by the Judge we are not in a position to do more than to dismiss the appeal with costs with reference to the provisions of s. 561.

FULL BENCH.

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March 26.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

SHEO RATAN LAL (PLAINTIFF) v. CHOTEY LAL (DEFENDANT).*

Sale in execution of decree—Money-decree—Decree enforcing hypothecation—Act X of 1877 (Civil Procedure Code), ss. 287, 316—Act VIII of 1859 (Civil Procedure Code), ss. 249, 259.

Certain immoveable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money, and was purchased by *C*, with notice that *L* held a decree enforcing a lien on such property. Subsequently *L* applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by *S*. *S* sued, by virtue of such purchase, to recover possession of such property from *C*. Held that, inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property and as *C* had purchased the property in suit with notice of the existing lien on it, and subject to its re-sale in execution of the decree in execution of which *S* had purchased it, what actually was sold in execution of that decree to *S* was such property, and *S* was entitled to possession of such property under such sale.

Sales under Act VIII of 1859 and Act X of 1877 distinguished.

THIS was a suit for possession of certain shares in two gardens. These shares belonged to one Husain Bakhsh, who on the 9th December, 1872, gave one Chamru Lal a bond in which he hypothecated them as collateral security for the payment of such bond. On the 17th September, 1875, one Manohar Das obtained a decree for money against Husain Bakhsh. On the 12th November, 1877, Chamru Lal obtained a decree against Husain Bakhsh on the bond of the 9th December, 1872, such decree enforcing the hypothecation of such shares contained in that bond. On the 5th January, 1878, the sale of such shares in execution of Manohar Das' decree, being fixed for the 20th January, Chamru Lal applied to the Court executing that decree that his lien on such shares might be notified at the time of sale. On the 20th January such shares were put up for sale, Chamru Lal's lien thereon being notified, and were purchased by the defendant in the present suit. On the 6th April, 1878, Chamru Lal applied for the sale of such shares in execution

* Second Appeal. No. 867 of 1880, from a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad with the powers of a Subordinate Judge, dated the 5th June, 1880, reversing a decree of Babu Premoda Charan Banarji, Munsif of Allahabad, dated the 15th December, 1879.

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of his decree of the 12th November, 1877, and they were put up to sale in execution of that decree on the 21st September, 1878, and were purchased by the plaintiff in the present suit. The present suit was subsequently instituted by the plaintiff against the defendant, in which he claimed possession of such shares by virtue of his auction-purchase, alleging that the defendant had purchased them subject to Chamru Lal's lien, and he (plaintiff) had priority over the defendant. The defendant set up as a defence that, as the plaintiff had purchased such shares after the same had been sold to him (defendant), he (plaintiff) had acquired no right thereto. The Court of first instance held, referring to *Kali Prosad v. Buli Singh* (1), that the defendant had acquired by his purchase the rights and interests of Husain Bakhsh only in such shares, that is to say, his equity of redemption, and he had not acquired such shares free from the incumbrance created thereon by Husain Bakhsh, while the plaintiff had acquired not only those rights and interests, but also the rights and interests which Husain Bakhsh and Chamru Lal could jointly pass to a purchaser of such shares, that is to say, the rights and interests which Husain Bakhsh possessed therein at the date of the mortgage to Chamru Lal; and that the plaintiff had therefore acquired such shares absolutely and was entitled to possession in preference to the defendant; and it gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held, following the decision of the High Court in S. A. No. 959 of 1878, dated the 7th May, 1879 (2), that, inasmuch as the plaintiff had purchased only the rights and interests of Husain Bakhsh, as all the proceedings in execution showed, and as at the time of his purchase no such rights and interests existed, the same having been extinguished by the previous sale to the defendant, the decision of the Court of first instance was wrong; and accordingly reversed it. On second appeal by the plaintiff it was contended on his behalf that, under the circumstances of the case, it must be taken that he had purchased the rights of Husain Bakhsh as they existed on the date of the hypothecation of the property in suit. The appeal came for hearing before Pearson, J., and Spankie, J., who, seeing some reason to doubt the correctness of the ruling in S. A. No. 959 of 1878, decided on the 7th May, 1879 (2), by which

(1) I. L. R., 4 Calc 789.

(2) Not reported.

the lower Court had been guided in disposing of the present case, referred the appeal to the Full Bench for disposal.

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Munshi *Kashi Parsad* and Babu *Oprokash Chandar Mukarji*,
for the appellant.

Pandit *Bishambar Nath* and Babu *Beni Prasad*, for the res-
pondent.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J., (STUART, O. J., and PEARSON, J., concurring).—
The facts are sufficiently detailed in the judgment of the Subordi-
nate Judge, by whom the question of law raised in the appeal is
very clearly stated. The simple point to be determined is, was the
sale of the 21st September, 1878, a wholly abortive and ineffectual
proceeding, which passed nothing to the auction-purchaser? It
must be conceded that both the sale-notification and certificate refer-
red to the "right, title, and interest of the judgment-debtor," and
the respondent contends that under these circumstances the appellant
acquired nothing by his purchase, because, at the time he effected
it, the judgment-debtor had no saleable right, title or interest. In
support of this view the judgment of a Division Bench of this Court
in S. A. No. 959 of 1878, decided on the 7th May, 1879 (1), was
quoted as an authority, and it appears to have been accepted and
acted upon by the Subordinate Judge as an apposite and conclusive
precedent. It seems, however, to have escaped his attention that
the decision in this case was passed when the provisions of Act
VIII. of 1859 were in force; and no doubt by them it was enacted
that not only should the notification of sale state that the sale would
only extend to the right, title, and interest of the judgment-debtor in
the "property sold," but that the sale-certificate granted to the
auction-purchaser should be limited to like terms. Ss. 287 and 316 of
Act X. of 1877, however, as amended by Act XII. of 1879, are very
different in their language, and contain no reference to the "right,
title, and interest of the judgment-debtor," or any limitation of the
kind to be found in the former Code. It may therefore well be that
under these circumstances the judgment of this Court, upon which
the Subordinate Judge relied, was an accurate one, as the law then

(1) Not reported.

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stood. But be this as it may, it is inapplicable to the appeal at present before us. For all that we have now to consider is what could be brought to sale under the decree declaring a lien on the property in favour of the mortgagee, and what could an auction-purchaser buy, and it seems obvious that this could only be the property mortgaged. If the contention of the respondent were to hold good, it would seem that the rights of a mortgagee could in almost all cases be defeated by a purchaser of the equity of redemption, with the result that the transferee of a mortgagor's right could assert a higher title than that which his transferor could give him. The proposition of the respondent that by his purchase in January, 1878, under the sale in execution of the simple money-decree of Manohar Das, he acquired the entire rights of the judgment-debtor in the property sold, seems not only startling, but most unreasonable, and to adopt it would be obviously inequitable. The respondent had the fullest notice, not only that the appellant held a charge upon the judgment-debtor's property, but that he had instituted a suit and obtained a decree to effectuate it by enforcement of lien. That decree was against the property pledged, and any interest an auction-purchaser, with notice of it, could get at a sale subsequent to it, in execution of a simple money-decree, would necessarily be subject to the lien declared by it. Neither by private nor compulsory sale could a higher title be given. The terms of the sale-notification and certificate have in fact no bearing upon the present case, and may be dismissed as surplusage. What actually was sold on the 21st September, 1878, was the property hypothecated under the bond of the 9th December, 1872, the mortgagee's lien upon which had been declared by the decree of the 12th November, 1877. We would therefore decree the appeal with costs, reverse the decision of the lower appellate Court, and restore that of the Court of first instance decreeing the plaintiff's claim.

SPANKIE, J.—The facts are admitted. In the case of which the reference makes mention (1) the right, title, and interest of the judgment-debtor were sold under s. 249, Act VIII of 1859, and the sale was limited to that right, title, and interest, and it was so proclaimed. Under the law as it stands now the property is sold and not the rights and interests only of the judgment-debtor in it. The

(1) S. A. No. 959 of 1878, decided the 7th May, 1879, not reported.

sale-proclamation, according to s. 287 of Act X. of 1877, shall specify the property to be sold, and amongst other requirements any incumbrance to which the property is liable. So again the sale certificate under the old Act declared that the purchaser had purchased the right, title, and interest of the defendants in the property sold (s. 259, Act VIII. of 1859). But now the certificate states the property sold and the name of the person who at the time of sale is declared to be the purchaser. The defendant Chotey Lal purchased the property in dispute in execution of a money-decree on the occasion of the first sale, and notice of the incumbrance under which the property was subsequently sold was given at the time of the sale, and the order of the Munsif directing the sale expressly does so subject to Chamru Lal's mortgage. So that the purchaser was fully aware of the true state of the case, and that he was buying subject to the lien held by Chamru Lal, who had also obtained a decree prior to the sale in which the sale was declared. The first sale may have extinguished the right and interest of the judgment-debtor and have placed the equity of redemption in the purchaser's hands. But that sale did not extinguish the mortgagee's lien upon the land as security for the debt due to him. The mortgagee had not surrendered his right, but still looked to the property pledged in whosoever hands it might be found; so that it is a mistake to conclude, as the second Court has done, that on the occasion of the second sale in September, 1878, there was nothing for the plaintiff to buy, because the right and interest of the judgment-debtor in the property had been lost by the first sale. Looking at all the circumstances of the case, I would reverse the decree of the lower appellate Court and restore that of the Court of first instance with costs.

OLDFIELD, J.—The plaintiff is a purchaser at auction in execution of a decree against Husain Bakhsh which ordered the sale of the property in suit in enforcement of a charge. The defendant had previously to the sale in favour of plaintiff bought the property in execution of another decree against the same Husain Bakhsh, but with notice of and subject to the charge made by the first named decree. The Court below has held that the plaintiff, having bought only the right, title, and interest of the judgment-debtor, which had

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passed to defendant before the sale, the plaintiff can take nothing by his purchase. This finding is, in my opinion, based on an erroneous view of the effect of the sale-proceedings in which plaintiff purchased the property and which were held under Act X of 1877. The present law of sale (s. 287) is somewhat different from that of s. 249, Act VIII of 1859, by which the proclamation declared that the sale extended only to the right, title, and interest of the defendant in the property specified therein. The sale now purports to be of specific property as saleable in execution of the decree against the judgment-debtor, and the certificate of sale given under s. 316 states the property sold and the name of the person declared to be the purchaser, and differs from the certificate given under s. 259, Act VIII of 1859, which gave only a declaration that the purchaser had purchased the right, title, and interest of the defendant in the property sold, and that the certificate should be taken and deemed a valid transfer of such right, title, and interest. The purchaser now obtains a *prima facie* title to the specific property sold, but it is in the power of any one other than the judgment-debtor, if dispossessed of any property in execution of a decree, to put in objections under s. 332, when the question arising under that section would be decided, subject to the result of a suit; or if the purchaser finds himself obstructed by any one claiming the property under an independent title, he is at liberty to sue to establish his right by purchase, when the title of the parties would be determined on the merits. In the case before us the notification of sale was not made in strict accordance with the present law, but the sale-certificate shows that what was sold was the property liable to sale under the decree against Husain Bakhsh, and if it be found that the property was liable to be sold, the plaintiff's title as purchaser is good notwithstanding the previous sale to the defendant; and this is shown to be the case, for the defendant bought the property with notice of the existing charges and subject to its re-sale under the decree in execution of which the plaintiff became the purchaser; the property was therefore rightly saleable and the plaintiff's title by purchase is valid. I would reply to the reference that the lower appellate Court's decree should be reversed and that of the Court of first instance restored.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1881
March 26.

RAMESHAR SINGH (DEFENDANT) v. KANAHIA SAHU (PLAINTIFF).*

Conditional sale—Interest—Mesne profits—Foreclosure—Regulation XVII of 1806, s. 7.

A deed of conditional sale, after reciting that the vendor had received the sale-consideration (Rs. 199), and had put the vendee in such possession of the property as the vendor himself had, proceeded as follows:—"I (vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession: and when, after the expiry of the term fixed, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute". The vendee did not get possession of the property for some years, and, on the expiry of the term, took proceedings under Regulation XVII of 1806 to foreclose. The legal representative of the vendor deposited the sale-consideration mentioned in the deed of conditional sale (Rs. 199) within the year of grace. In a suit by the vendee for possession of the property, the sale having been declared absolute, the question arose whether or not the legal representative of the vendor should have deposited, by way of interest, in order to prevent the sale from becoming absolute, in addition to the sale-consideration, the amount of mesne profits for the period the vendee was out of possession of the property. *Held* (SPANKIE, J., dissenting), on the construction of the deed of conditional sale, that the deposit of the sale-consideration (Rs. 199) was sufficient for the redemption of the property.

THE plaintiff in this suit claimed possession of a certain share in a certain village, by virtue of a conditional sale of such share which had been declared foreclosed. The instrument by which this conditional sale was made, dated the 1st December, 1868, provided that possession of such share should be given to the conditional vendee, the plaintiff, for a term of six years, and contained the following stipulation:—"I (the conditional vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall receive mesne profits for such time as he may be out of possession: when on the expiration of the term I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute." The defendants were the legal representatives

* Appeal under s. 14, Letters Patent, No. 1 of 1881.

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of the conditional vendor. Of them Rameshar Singh alone contested the suit. He contended that, as he had deposited the entire sale-consideration and the costs of the foreclosure proceedings, within the year of grace, the sale had been improperly declared foreclosed. It appeared that the conditional vendor had not given the plaintiff possession of the property, but had retained possession of it; and that it was only when the conditional vendor made the property over to a third party that the plaintiff acquired possession of it by right of pre-emption. With reference to the fact that he had been kept out of possession of the property for some years, the plaintiff contended that, inasmuch as the conditional vendor had not placed him in possession of the property, in accordance with the terms of the conditional sale, but had retained possession thereof himself, the defendant should have deposited the mesne profits of the share for such period as the plaintiff was not in possession, in addition to the amount of the sale-consideration and the costs of the foreclosure proceedings, and, having failed to do so, the mortgage had been properly declared foreclosed. The Court of first instance framed the following issues upon this point, viz., "What sum was it necessary to pay in the foreclosure case, and in default of payment of that sum, did the foreclosure alleged by the plaintiff rightly take place." The Court of first instance held upon this issue that, with reference to the terms of the conditional sale, all that the defendant was bound to deposit was the sale-consideration, and that he was not bound to deposit mesne profits, and that as the sale-consideration had been deposited with time, the property must be regarded as redeemed; and it dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court held that it was incumbent on the defendant to have deposited the mesne profits of the property, and that, as he had failed to do so, the sale had become absolute; and it gave the plaintiff a decree for possession of the property. The defendant appealed to the High Court, contending that, under the terms of the conditional sale, it was not incumbent on him to have deposited the mesne profits in order to prevent foreclosure. The appeal came for hearing before Pearson, J., and Spankie, J., who differed in opinion on the question whether, under the terms of the deed, mesne profits should have been deposited in order to save fore-

closure. The following judgments were delivered by those learned Judges :

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PEARSON, J.—The question which we are called to determine in appeal is that upon which the lower Courts have differed in opinion, *viz.*, whether the plaintiff was entitled to payment of the mesne profits due to him in lieu of interest as a condition of the redemption of the estate, the subject of the conditional sale, in addition to the amount of the sale-consideration. That question must, I conceive, be determined strictly in reference to the terms of the deed of conditional sale, and must therefore be determined in the negative. For the terms of that deed are that “when, after the fixed period, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed, and, in case of default of payment of the sale-consideration, the sale shall be held to become absolute.” Such being the terms of the contract, the plaintiff in seeking to foreclose his mortgage was not warranted in demanding, nor was the defendant, appellant here, bound to pay, more than the amount of the sale or mortgage consideration. That amount was tendered by him, and should have been accepted by the plaintiff, whose present suit was accordingly, in my judgment, rightly declared by the Court of first instance to be unmaintainable and was dismissed. At the time of the execution of the deed aforesaid in the plaintiff’s favour, it was apparently intended that he should take possession of the property to which it refers and himself realize the mesne profits in lieu of interest on the sale or mortgage consideration; but it was provided in the deed that, should he not have possession, he should receive the mesne profits of the period of non-possession. To those profits he was doubtless entitled; but it does not follow that he could lawfully claim them in addition to the aforesaid consideration as a part of the condition of redemption of the property. What was contemplated was presumably that they should be realized by him or paid to him year by year. It seems that, as a matter of fact, the executant of the deed retained possession of the property until 1874, when he made it over to a party from whom the appellant before us acquired it by right of pre-emption. How far he is liable for the mesne profits in question we are not now required to determine. I would allow the appeal with costs, and

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reversing the lower appellate Court's decree, would restore that of the Court of first instance.

SPANKIE, J.—In dealing with this case I desire to confine myself strictly to the question that arises in the pleas relied on in appeal as to the misconstruction of the terms of the deed of conditional sale, the basis of this suit, by the lower appellate Court. By the terms of the deed the mortgagor agrees to put the mortgagee in possession of the property mortgaged. The one is not to claim mesne profits (*wāsilāt*) and the other is not to claim interest (*sūd*), and after the period fixed for repayment of the loan the mortgagor is at liberty to redeem on deposit of the whole and entire sale-consideration in a lump sum. Were there no other conditions than these in the deed of conditional sale, the transaction would then assume the character of an usufructuary mortgage, the profits being enjoyed by the mortgagee in lieu of interest, and the mortgagee not being liable to any account, and being entitled to redeem the property on payment of the principal sum borrowed, when the term fixed in the deed had expired. The mortgagor would have been bound to give possession to the mortgagee, and if he refused to do so, or was unable to do so, the mortgagee might sue him at once for the recovery of his money or for possession. But there is another condition of the deed, which runs thus, that "in case of (the mortgagee's) not obtaining possession (*adam dakhāl yābī*), he shall receive "*wāsilāt*" for the period during which he was out of possession". On the assumption that the *wāsilāt* or profits were to be enjoyed as interest, the mortgagee, not obtaining possession, was not under any obligation either to sue for possession or to bring a suit at once for the recovery of his money. He was at liberty to wait until the term of the mortgage had expired. The plaintiff-respondent, relying on the terms of the deed, claims mesne profits as interest during the period he remained out of possession. The first Court holds that the plaintiff is not entitled to demand the sum claimed along with the principal of the loan before redemption can be had. But the second Court in appeal has taken a different view, holding that it was intended by the terms of the deed that, if the mortgagee did not obtain possession, he was entitled to the mesne profits in lieu of

interest, and that he was entitled to the sum as claimed. I am disposed to accept the finding of the lower appellate Court as being good in law and also equitable. It seems to me that, when the mortgagee found himself in the position provided for in the deed, that is to say, when he did not obtain possession, the character of the mortgage transaction was changed. One condition provided for the possession of the mortgagee and his enjoyment of the profits in lieu of interest,—“I shall not claim the mesne profits (*wāsilāt*) and the vendee shall not claim interest (*sūd*)”. The other condition provided for the payment of interest to the mortgagee, should possession not be taken. The profits (*wāsilāt*) are to be enjoyed by the mortgagee during the period of his being out of possession. The mesne profits by the terms of the deed were to be regarded as interest if the mortgagee took possession, and it is difficult to understand how, upon the face of the bond, they should be looked upon in any other light, in the event of the mortgagee remaining out of possession, a possibility contemplated by the parties and arranged for by the contract. S. 7, Regulation XVII of 1806, applies to cases in which the mortgagee is in possession, and to cases in which the mortgagor has himself retained possession, and the provision respecting the latter case is that the payment or tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to redeem his property. The terms of the contract show that the possibility of the mortgagee not obtaining possession was foreseen, and it was provided for. If it was intended that he was to receive profits as interest, it cannot be said that there is any difficulty about the rate of that interest. The mesne profits are the measure of the interest. As the sale-consideration was Rs. 199, and the profits are found to be Rs. 39-11-5½ per annum, the interest was not by any means excessive, the mortgage having been made for six years. Again, I do not consider that it was necessary for the mortgagee to realize the profits, intended to be interest, yearly, as they fell due. Regarding the profits as interest, he was at liberty to wait until the term of the mortgage had expired, when he could foreclose. Then if the mortgagor was anxious to redeem at any time before foreclosure, he was I think bound to tender the principal sum with any interest due thereon. The memorandum of appeal does not disclose any

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further objections. I would therefore dismiss the appeal and affirm the decree of the lower appellate Court with costs.

The defendant appealed to the Full Court from the judgment of Spankie, J., under s. 10 of the Letters Patent.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Kasli Prasad*, for the appellant.

Munshi Hanuman Prasad, for the respondent.

The following judgments were delivered by the Full Court :—

OLDFIELD, J., (STUART, C. J., and STRAIGHT, J., concurring).—A mortgage with conditional sale was made of the property in suit by Nawaz Singh, now represented by the defendant-appellant, to the plaintiff-respondent. The deed, after reciting that the executant sells the property for Rs. 199, proceeds: "Having received the whole consideration mentioned in the deed, I put the vendor in possession and enjoyment of the thing sold in every way like myself: I shall not claim mesne profits nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession, and when, after the expiry of the term fixed, I repay the whole consideration in a lump sum, I shall get my share redeemed, and in case of default of payment of the sale-consideration the sale shall become absolute." The respondent who did not get possession took proceedings to foreclose on expiry of the term, and the appellant deposited the sum of Rs. 199, the consideration mentioned in the deed, within the year of grace, and the only question we are concerned with in appeal is whether the appellant was bound, in order to prevent the sale becoming absolute, to have deposited, besides the sum of Rs. 199, the amount of mesne profits due for the period the respondent was out of possession of the property. In our opinion the deposit was sufficient for the redemption of the property with reference to the contract entered into between the parties. It will be seen from the terms of the deed above quoted that there was to be no claim for interest, and that it was stipulated that the mortgagor might redeem on payment of the sale-consideration, which was the sum of Rs. 199. The mortgagee was entitled to the mesne profits in lieu of any stipulated

sum by way of interest, and he could recover those profits by taking possession of the property or suing for their recovery, as they fell due, but it was not intended that payment of them should be a condition precedent to redemption. Regulation XVII. of 1806, s. 7, directs that, when the mortgagee has not possession of the property, the mortgagor must deposit, in order to redeem the property, the principal sum lent with any interest due thereon. It may be questioned if the mesne profits which the mortgagee agreed to receive in lieu of interest can be considered to be properly interest within the meaning of the Regulation. There is nothing certain or final as to the amount, and one of the objects of the Regulations is to make as definite and precise as possible the amount which the mortgagor has to deposit, since any mistake as to the exact amount entails forfeiture of the property. The case of *Rama Singh v. Munnoo Lal* (1) is in point. We would decree the appeal with costs and make a decree in the terms proposed by Mr. Justice Pearson in his judgment dated the 24th November, 1880.

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PEARSON, J.—I have little, if any thing, to add to what I have already said in my judgment of the 24th November last, except that on reconsideration, after hearing arguments on both sides before the Full Bench, I adhere to the opinion therein expressed. By the terms of the deed of conditional sale it is expressly declared that the purchaser shall not be entitled to interest. The provision that, in the event of his not obtaining possession, he shall receive the mesne profits of the period during which he may be out of possession, did not entitle him under Regulation XVII. of 1806 to claim and receive, or bind the defendant-appellant to tender, along with the amount of the sale-consideration, any further sum that might be due to the plaintiff on account of mesne profits, in the foreclosure department, merely on the ground that presumably the mesne profits of the mortgaged property were assigned in lieu of interest on the mortgage consideration pending the mortgage-tenure. Mesne profits do not become interest because they are taken instead of interest. The substitute or equivalent for a thing is something distinct from that thing and not identical with it. No interest whatever was due under the deed in the present case, and

(1) 8 N.-W. P. S. D. A. Rep., 441.

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therefore the provisions of the Regulation above-mentioned relative to the payment of interest are inapplicable.

SPANKIE, J.—I adhere to the view of the case expressed by me in my judgment of the 24th November, 1880.

Appeal allowed.

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March 26.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

LALJI MAL AND ANOTHER (PLAINTIFFS) v. HULASI AND ANOTHER (DEFENDANTS).*

Suit for recovery of Immoveable property—Mesne profits—Relinquishment of part of claim—Act X of 1877 (Civil Procedure Code), s. 43, 44—Mortgage—Specific performance of contract—Compensation.

According to the terms of a mortgage possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgages had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne profits. The mortgagee subsequently sued the mortgagor to recover the mesne profits of the mortgaged property for those two years. *Held that*, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, *viz.*, the breach of the contract to give possession, the second suit was barred by the provisions of s. 43 of Act X of 1877.

THIS was an application to the High Court by the plaintiffs in this suit to revise the appellate decree therein of Mr. R. G. Currie, Judge of Aligarh, dated the 25th March, 1880. It appeared that the defendants had mortgaged a certain estate to the plaintiffs, promising to place them in possession thereof. They failed to perform this promise, and consequently the plaintiffs had instituted a suit against them on the 24th August, 1878, claiming possession as mortgagees of such estate. The plaintiffs obtained a decree in that suit on the 31st January, 1879. The plaintiffs subsequently instituted the present suit against the defendants, in which they

* Application, No. 51B. of 1880, for revision under s. 623 of Act X. of 1877 of a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 25th March, 1880, modifying a decree of Munshi Shankar Lal, Munsif of Khair, dated the 16th December, 1879.

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claimed, *inter alia*, Rs. 296 odd, the mesne profits of such estate which had accrued in the period, prior to the institution of the first suit, during which the defendants had, contrary to their promise contained in the contract of mortgage, retained possession of such estate. The defendants set up as a defence that, inasmuch as the plaintiffs had omitted in the former suit to claim such mesne profits, their claim for the same in the present suit could not, under the provision of s. 43 of Act X of 1877, be entertained. The Court of first instance disallowed this contention and gave the plaintiffs a decree for such mesne profits. On appeal by the defendants the lower appellate Court allowed the contention, and reversed the decree of the Court of first instance. The plaintiffs applied to the High Court for the revision of the lower appellate Court's decree, contending that the claim was not barred by s. 43 of Act X of 1877. The application came for hearing before Pearson, J., and Straight, J., and was referred by those learned Judges to the Full Bench for disposal.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad*, for the plaintiffs.

Mr. *Chattarji*, for the defendants.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J., (STUART, C. J., PEARSON, J., and OLDFIELD, J., concurring).—The original suit, which was instituted on the 24th August, 1878, was in reality one for the specific performance of the contract of mortgage, by which defendants, mortgagors, had undertaken to give possession to the plaintiffs, mortgagees, but had failed to do so. At the time of that suit being brought the plaintiffs, mortgagees, had been kept out of possession during the years 1284-85 fasli, during which period the defendants had received and enjoyed the mesne profits derived from the mortgaged property, which the plaintiffs were entitled to under the mortgage upon the basis of possession being given to them. It seems therefore clear that the plaintiffs might in the original suit, in addition to seeking relief by specific performance of the mortgage contract, have asked for compensation for the breach of it, the measure of which would have been reasonably estimated at the amount of mesne profits misappropriated. Moreover it is plain that the claims to pos-

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session and mesne profits were in respect of one and the same cause of action, namely, the breach of the contract to give possession. It may well be that in some cases a claim to mesne profits would, as contemplated by s. 44 of Act X of 1877, amount to a cause of action distinct from that on which a suit for the recovery of immoveable property or for declaration of right to immoveable property might be founded. But in the present instance the possession and mesne profits were so mixed up and involved with one and the same common cause, namely, the non-delivery of possession, that they must be taken as constituting "the whole claim the plaintiffs were entitled to make in respect of the cause of action" on which the suit was instituted in August, 1878. We would refuse the application for revision of the Judge's order with costs and direct the record to be returned.

SPANKIE, J.—The Judge is, I consider, right. S. 44, Rule a., provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, *except* claims in respect of mesne profits or arrears of rent in respect of the property claimed. Claims by a mortgagee to enforce any of his remedies under the mortgage also are included in the exception. Such claims therefore can be joined in a suit for recovery of immoveable property without the leave of the Court. The Munsif has misread, and so misapprehended, the section. Certainly the claim for mesne profits up to date of suit could have been joined with the claim to recover the immoveable property, and it may be that the claim to enforce the terms of the mortgage and to obtain possession of the land under it would include the relief to which the mortgagee would be entitled in respect of the mesne profits, which he would have realized if possession had been given to him, and under s. 43, third paragraph, a person entitled to more than one remedy may sue for all or any of his remedies; but if he omits, except with the leave of the Court obtained before the first hearing, to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. This, however, I do not insist upon in regard to the present case, in which it is sufficient to say that s. 43, Rule a., (a), seems clearly to govern the question, for if the original plaintiff was at all entitled to possession as claimed in the suit of the 24th August, 1878, he was entitled to all the

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mesne profits up to date of suit. They form really a part of the claim which he was entitled to make in respect of the cause of action arising out of the breach of contract to put him in possession of the land. Under the terms of the first paragraph of s. 43 of the Code every suit shall include the whole of the claim; s. 44, Rule a., (a), allows the claim to be made. If the claim for mesne profits prior to suit was not made in the original suit in 1878, it cannot now be made in regard to that period. I think this is shown from other sections of the Code. S. 211 gives the Court power to provide in the decree for the payment of mesne profits in respect of the property in suit from its institution until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs). S. 212 also empowers the Court itself in a suit for immoveable property to determine the amount of profits due prior to the institution of the suit, or to pass a decree for the property and direct inquiry into the amount of mesne profits, and dispose of the same on further orders. S. 244 provides for the determination of the amount of mesne profits due, where the decree has directed inquiry, or where the decree, as in s. 211, has made mesne profits payable from the institution of the suit until the delivery of possession. That question, s. 244 declares, shall be determined by the Court executing the decree and not by a separate suit. But the last part of this section shall not be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree. Looking at the terms of ss. 43 and 44, Rule a., (a), ss. 211, 212 and 244 of the Code, I come to the conclusion that mesne profits which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a separate suit, though a separate suit is permissible for mesne profits accruing between the institution of the first suit and the execution of the decree therein, when such profits are not dealt with by such decree. I would therefore say that the Judge's order is not open to revision under s. 622 of the Code, his order being according to law.

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 March 28.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. RAMANAND.

Defamation—Good faith—Act XLV of 1860 (Penal Code), s. 499.

C was put out of caste by a panchayat of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of such panchayat, circulated a letter to the members of their caste generally in which, stating that *C* and such woman had been put out of caste, and the reason for the same, and requesting the members of the caste not to receive them into their houses or to eat with them, they made certain statements applying equally to *C* or such woman. Such statements were defamatory within the meaning of s. 499 of the Indian Penal Code. *Held* that, if such persons were careless enough to use language which was applicable to *C*, they did so at their peril, and they could not escape the responsibility of having defamed *C* by saying that they intended such language to apply to such woman. *Held* also, on the question whether such persons had acted in good faith, that, looking to the character of such letter, the circumstances under which it was written, and to the fact that *C* had been put out of caste for the reason alleged, had such persons contented themselves with announcing the determination of the panchayat, and the grounds upon which such determination was based, they would have been protected; but, inasmuch as they did not so content themselves, but went further and made false and uncalled for statements regarding *C*, they had rightly been held not to have acted in good faith.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Hill, for the petitioner.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—This is an application, under s. 297 of the Criminal Procedure Code, for revision of an order of Mr. F. Kilvert, Magistrate of the first class, passed upon the 15th May, 1880, by which he convicted the five applicants of an offence under s. 499 of the Indian Penal Code, and sentenced them to pay a fine of Rs. 50 each, or in default to be rigorously imprisoned for two months. The complainant, Chunni Lal, and the defendants were all members of a high caste of Gujrati Brahmans, who resided in the Tarai. It appears that some time in the year 1879 it was ascertained that Chunni Lal was keeping up an improper connection with a woman named Hira, the widow of a deceased member of the

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brotherhood, and ultimately a panchayat was held at which it was resolved to put Chunni Lal out of caste. In order to fully effectuate their decision, the members of the panchayat drew up a circular letter for communication to the other Gujrati Brahmans of the North-West, and it is in this document that the alleged defamatory matter appears. The material portion of it is as follows:—"Now we, all members of the caste, beg to say that Chunni Lal had long been enamoured of Baiji Hira, and he used to have illicit intercourse with her: the members of the brotherhood, having seen this, remonstrated with him (or them) greatly on many occasions, but he (or they) did not mind, and it is said she has become pregnant, and the mohalla chaukidar has given information at the police-station, and he (or she or they) is (or are) accused in the case, and the Government is the prosecutor." The letter goes on to say that Chunni Lal and Hira have both been put out of caste, and the brethren are warned that should "either of these out-castes" come "to their villages," they are not "to mess them." Of the defamatory character of this document there can be no doubt, and it afforded ample "*prima facie*" material for a charge under s. 499 of the Penal Code. But beyond the imputations it might be naturally taken to convey, the complainant, Chunni Lal, maintained that the passage concluding with the words "and the Government is the prosecutor" bore the construction that he had been accused by the police of having caused the woman Hira to procure abortion, and that so serious was the matter that the Government had taken it in hand. The defendants did not deny that they had signed the incriminated letter, but their defence seems to have been that the statements in it alleging the illicit connection, and that Chunni Lal had been put out of caste, were true in substance and in fact, and that they were made in good faith and for the purpose of informing the brotherhood of a matter in which all the members had a common interest. With regard to that part of it in which the "chaukidar" is mentioned as having given information, they alleged that it had no reference to the complainant, Chunni Lal, but was solely and entirely applicable to the woman Hira. The Magistrate, however, was of opinion that all the statements were made concerning the complainant himself, that they were not true, and that they had not been made in good faith. With the first of these conclu-

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sions I am not prepared to find fault. The document is open to the construction that the Magistrate places on it; and I agree with him that it would be straining matters to infer, as asked by the complainant, that it goes the actual length of alleging that a charge of abortion had been made against him. At the same time, assuming him to be the person referred to, it does assert that he had done something in reference to the woman that had been made the subject-matter of a charge, and that a prosecution had been undertaken. If the defendants were careless enough to use language that an ordinary reader might reasonably interpret to reflect upon the complainant, and lead to the inference that he had done something punishable by law, they did so at their peril, and they cannot now escape responsibility by saying that they intended it to apply to another person. I concur therefore with the Magistrate that the letter did make it appear that Chunni Lal had been guilty of conduct in relation with the woman Hira that had resulted in a complaint to the police and steps being taken thereon. With regard to the second conclusion, I do not feel myself competent to interfere in revision. The Magistrate, as I gather from his judgment, finds as fact that no complaint was ever made at the police-station as to Chunni Lal; nor was Government the prosecutor of any complaint against him. Upon these findings the defendants were obviously not entitled to the protection of *Exception 1*, s. 499 of the Penal Code. But now I come to the final conclusion of the Magistrate, namely, that the defendants had not acted in good faith, and as to this I cannot say that the case is altogether without difficulty. Did the defendants make the imputations contained in the circular letter and communicate them to the other members of their caste "*bond fide*" and for the purpose of giving information upon a matter of importance and interest common to all the brotherhood? The character of the document itself, the circumstances under which it was written, and the fact that Chunni Lal had been put out of caste, are certainly strongly in favour of their good faith, and had they contented themselves with announcing the determination of the panchayat and the grounds upon which it was based, I think they would have been protected. But they were not satisfied to do this, but travelled into other matters, the falsity of which in point of fact negatived the presumption to which they would otherwise

have been entitled, namely, that they had acted in good faith, that is, with due care and caution. They should not have insinuated against Chunni Lal that he had committed some offence with regard to the woman, cognizable by the authorities, without first satisfying themselves that such was actually the case, for information was readily accessible had they chosen to make inquiries at the police-station. Moreover this part of the letter was wholly unnecessary, for the occasion did not call for any statement of the kind, and it was amply sufficient for the object they had in view to inform the brotherhood of the decision of the panchayat and of the circumstances that had led to it. I think, therefore, that the Magistrate rightly held the defendants to have been wanting in that care and caution, which had they exercised it would have established their good faith, and so lost the protection they would otherwise have had. Mr. Hill for the applicants raised a point upon the question of publication, but having regard to the remarks made in the Magistrate's judgment, and upon consideration of the statements made by them when upon their trial, I think this is sufficiently proved. In the other points urged for revision I see no force. The application must therefore, upon the grounds upon which it is asked, be refused.

But I think it right to say upon the question of punishment that, while the defendants were properly convicted, the extent of their moral turpitude was the failure to exercise that reasonable amount of care and caution which would have established their good faith in point of law. No Court could wish to interfere with those domestic rules and laws which regulate and control the relations between the members of a caste. On the contrary, the tendency would rather be to countenance and protect them. The defendants in the present case no doubt meant for the best, but they allowed themselves to be betrayed into statements and expressions which upon examination it turns out they can neither substantiate nor excuse. I do not think there was a deliberate intention upon their parts to vilify Chunni Lal, and it seemed to me that the Magistrate rightly measured their culpability when he inflicted a fine and not imprisonment by way of punishment. But it seems to me that the justice of the case would be met by a lesser penalty than

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fifty rupees, and I therefore reduce the amount of the fine to twenty rupees each, and the excess realized will be handed back. The record may be returned.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

TAJAMMUL HUSAIN (DEFENDANT) v. UDA AND ANOTHER (PLAINTIFFS).*

Pre-emption—Rights of pre-emptor—Sale-contract—Purchase-money.

A pre-emptor is entitled to all the benefit which the vendee takes under the contract of sale. *Held* therefore, where a certain sum was fixed as the price of the property, and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor, as part of the sale-contract, that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale, and the vendee recovered such moneys, that the pre-emptor was entitled to a deduction of the amount of such moneys from the sum originally fixed as the price of the property.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu *Oprokash Chandar Mukarji*, for the appellant.

Babu *Barodha Prasad Ghose*, for the respondents.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The plaintiff sues to recover by right of pre-emption property sold to appellant on payment of Rs. 13,866-6-6. The lower appellate Court decreed the claim, and the only question before us is the sum which appellant should receive from plaintiff. It has been found, and is not disputed, that the price of the property was fixed at Rs. 14,483-0-0, and appellant paid that sum to the vendor; but it was subsequently agreed between him and the vendor, as part of the sale-contract, that appellant should recover for his own benefit certain sums due on the estate to the vendor at the time of sale, namely, Rs. 209-8-6, compensation for land received

*First Appeal, No 121 of 1880, from a decree of Manlvi Nasir Ali Khan, Subordinate Judge of Sahāranpur, dated the 24th June, 1880.

by the vendor, and the kharif kists due at the time of sale. In accordance with this agreement appellant received from the vendor Rs. 209-8-6, compensation for land, and Rs. 165-12-3, kists realized by the vendor, and he was given the account-sheet of the balance of the kharif kists amounting to Rs. 241-4-9, in order to realize the same; and we find he admitted in the lower Court that he had realized the amount. Thus he got back from the sale-price he had paid Rs. 616-9-6, and plaintiff as pre-emptor, standing precisely in appellant's place as purchaser, is entitled to all the benefits which the appellant had under the sale-contract, that is, to a deduction of the above sum of Rs. 616-9-6 from the price originally fixed, leaving Rs. 13,866-6-6, payable to the appellant. The decision of the lower Court is therefore correct, and the appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

PATTERSON (DEFENDANT) *v.* THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (PLAINTIFF) *.

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Cantonment—Grant of land for building purposes—Right of Government to eject grantee—Regulations and Orders for the Bengal Army—Alluvial lands—Assessment of rent—Jurisdiction.

Certain ground situate within the limits of a cantonment was granted for building purposes by the military authorities in 1802. In June, 1873, such cantonment was abandoned and the ground comprised therein was made over to the Collector of the district in which it was situate. The Government subsequently sued *P*, who had succeeded to such grant, claiming (i) a declaration of its proprietary right to the ground comprised in such grant and to the alluvial accretions to such ground, (ii) that *P* should be directed to pay rent for such ground and such alluvial accretions, and (iii) that, should *P* refuse to pay the rents fixed, she might be ejected and the Government put in possession. *Held* that, inasmuch as under the Military Regulations relating to such grants such a grant cannot be resumed by the Government without a month's notice and without payment of the value of such buildings which may have been authorised to be erected, and as the Civil Courts had no jurisdiction in the matter of assessing rent on such alluvial accretions, which were outside the original grant, the Government was not entitled to the second and third reliefs it claimed, but was entitled only to a declaration of its proprietary title to such ground and to such alluvial accretions.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Lala Lalta Prasad, for the appellant.

* First Appeal, No. 98 of 1880, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 16th April, 1880.

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The Senior Government Pleader (*Lala Juala Frasad*), for the respondent.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

SPANKIE, J.—The plaintiff prays first that his absolute proprietary rights may be declared in certain fields of old or "*uparwar*" lands within the former military cantonment at Gházipur, measuring 25 acres, 1 rood, 18 poles, and in 38 acres, 2 roods, 35 poles of alluvial land attached to certain of these fields as detailed at the foot of the plaint. Secondly that the defendant be directed to pay at the rate of one rupee per acre of the old or *uparwar* lands, and Rs. 3-1-2 per acre of the recent alluvial lands, or such sum as may be deemed reasonable by the Court, as tenant for the use and occupation of the lands. Thirdly that should defendant refuse to accept the rent, she may be ejected and plaintiff be put in possession of the lands. The military authorities occupied the cantonment from 1801 to 16th June, 1873. During their occupancy plots of the land were granted to defendant's predecessors, for building purposes, and since then defendant and those whom she represents have had possession and use of the lands without payment of rent. Accretions have been made to some of the lands from the Ganges river and these have also been held by defendant without payment of rent. When the lands were restored to the Collector on the 16th June, 1873, he subsequently in November, 1879, called upon defendant to pay rent and execute a counterpart of a lease for the land, which, however, she refused to do. Hence the present suit. The defendant contends that plaintiff has no cause of action. Under the Military Regulations a grant of land made by Government in the military department cannot be resumed without giving one month's notice, and payment of the value of the buildings erected by the occupant on the land. Defendant and her predecessors in title have held the lands as proprietors without payment of rent for upwards of sixty years. Consequently the suit is barred by limitation. There was also a plea that the Civil Court had no jurisdiction to assess rent. This plea, however, was confined to the alluvial accretions. The Judge holds that the Military Regulations on which defendant relies had reference to all houses and compounds within the limits of a military cantonment,

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and the object was to recoup any officer, who had been compelled to build a house on the site allotted to him within the cantonment, the value of the said house, provided that the land on which it stood was required by Government. The Government had the power to resume all lands so situated, and prescribed the proceedings necessary to be carried out when occasion occurred for exercising that power. As to the rent, the Judge held that the lands now occupied by defendant were within the limits of the old cantonment surrendered to the Collector in 1873. The Government lays no claim to the houses or their remains, and was clearly entitled to rent. It was altogether erroneous to contend that the grant had been in perpetuity. The military authorities had no authority to alienate lands made over to them for purely military purposes. With regard to the alluvial accretions, the Judge was of opinion that the Civil Court had jurisdiction, as the concluding portion of s. 1, Act XVIII. of 1873, runs as follows:—"Save as provided in ss. 171 and 172 nothing herein contained applies to land for the time being occupied by dwelling-houses or manufactories or appurtenant thereto." Most of the lands in suit were occupied by dwelling-houses on the banks of the Ganges and have yearly alluvial increments which are undoubtedly appurtenant to the said houses. He cited *Chotuck Pandoo v. Mirza Inayat Ali* (1) to show that a suit for the delivery of a kabuliat (counterpart of lease) for rent of land occupied by a dwelling-house was not cognizable by the Revenue Court. On the question of limitation the lower Court found that the cause of action arose on the 14th December, 1879, and as the claim had been instituted within three years from that date, it could not be barred by lapse of time. Under these circumstances the Judge decreed the claim as brought without costs. Defendant contends as before that, as the preliminaries required by paragraph 12, s. 11, Military Regulations, had not been observed by the plaintiff, he was not competent to bring the suit. The Judge had made no inquiry regarding the terms and rules under which the disputed land had been granted, but had hastily assumed the right of the Government to claim rent or recover the land. Appellant repeats her former plea that her possession and that of the former owners whom she represents had been adverse,

(1) N.-W. P. H. C. Rep., 1868, p. 49.

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being that of a proprietor, for more than sixty years, and the circumstance that the lands were no longer used for military purposes would not give plaintiff any right to assess rent or recover the land. The Judge has misunderstood the bearing of Act XVIII. of 1873. The claim so far as it relates to assessment of rent on the alluvial lands is cognizable by a Revenue Court. The lower Court has improperly passed a decree for rent without any inquiry or finding. The pleas in appeal are not without force. From the correspondence between the Collector, Board of Revenue, and the Government of India, on record, there can be no doubt that the lands of the zamindars were taken up for cantonment purposes in 1802, and that the plot in dispute now is a portion of the cantonment land which was granted to the defendant's predecessors for the purpose of building thereupon. It has not been shown to us that the Government is at liberty to eject the defendant if she refuses to pay the rent now demanded. On the other hand, though we have no precise evidence as to the exact terms upon which land was granted in 1801, it is clear from the General Regulations of the Bengal Army consolidated and published in 1855 by authority, that all such grants were to be duly registered and Government retained the power of resuming any grant of ground on giving one month's notice and paying the value of such buildings as may have been authorised to be erected (1). It is only reasonable and equitable that some such guarantee would have been given, otherwise people would not have consented to lay out their money in building upon ground in cantonments for the convenience of public officers. The ground is of course the property of Government, but a distinction was drawn between the ground of the cantonment and buildings upon it. This was recognised in *Carey v. Robinson* (2). We were pressed by a decision of this Court, *Babu Ramchand v. The Collector of Mirzapur* (3). But the circumstances of that case are unlike those in the present one. In that case the plaintiff

(1) The regulations relating to such grants now in force will be found in Regulations and Orders for the Army of the Bengal Presidency, 1880; s. 17, paragraph 42 says:—"No ground will be granted except on the following conditions, which are to be subscribed to by every grantee, as well as by those to

whom his grant may subsequently be transferred:—

(a) Government to retain the power of resumption, at any time, on giving one month's notice and paying the value of such buildings as may have been authorised to be erected, &c., &c."

(2) 1 Ind. Jur. (1866), 88.

(3) N.-W. P. H. C. Rep., 1868, p. 7.

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claimed that, whilst the military authorities held the land, they permitted his ancestor to occupy the portion sought to be assessed with rent as a grove, and he urged that no assessment could be made now as the period of limitation had expired. The plaintiff too failed to show any grant or the terms upon which his ancestor was allowed to occupy the land. It was held that the military authorities had no power to create a permanent title in any person whom they might suffer to plant a grove. In this case the title of Government to the land is not denied. It is certain that one month's notice must be given before ejectment, and the value of the buildings must be paid before. We understand from the Government pleader that the Government does not deny that the defendant is entitled to compensation for the buildings, if the land is resumed. This Court cannot do more than declare that the Government is the owner of the land in suit, but as the case presents itself to us we cannot direct the defendant to pay the rent demanded for the old land. The lands were surrendered by the military authorities in 1873 to the Collector. The Government should effect such an arrangement with the defendant as she is entitled to by the original regulations and usage in respect of similar buildings in cantonments which have ceased to be occupied by Government. She does not deny that the Government can claim the land on giving one month's notice and paying the value of the buildings erected on it. It may be noticed that certain lands, 38 acres, 2 roods, 35 poles are included in the claim, which have been added to the original grant by alluvion. It is not pretended that those lands are not open to assessment. But the Civil Court has nothing to do with the assessment. These plots are not a portion of the original grant for building purposes, but are altogether outside it, and the title of the Government to them is not denied. It will be sufficient, and indeed all we can do in this case is, to declare the title of Government to the lands in suit, and to dismiss the claim in so far as the reliefs sought in the second and third prayer of the plaint are concerned. We therefore modify the decree of the Court below with costs in proportion to decree and dismissal.

Decree modified.

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Before Mr Justice Spankie and Mr. Justice Oldfield.

MUNIR-UD-DIN KHAN AND ANOTHER (AUCTION-PURCHASERS) v. ABDUL RAHIM KHAN (DECREE-HOLDER).*

Sale in execution of decree of share of undivided estate—Confirmation of sale in favour of Co-sharer—Appeal by auction-purchaser—Act X. of 1877 (Civil Procedure Code), s. 310.

A share of undivided immoveable property was put up for sale in execution of a decree, and was knocked down to *M*. Before it was knocked down to him *A*, the decree-holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to *M*, claiming the right of pre-emption. The Court executing such decree subsequently made an order confirming the sale of such share in favour of *A*. *M* appealed, impugning the propriety of the confirmation of the sale in favour of *A*. Held that such appeal would not lie.

THIS was an appeal from an order confirming a sale in execution of a decree in favour of the respondent. Certain shares of a certain undivided immoveable property were put up for sale in execution of a decree on the 21st November, 1879. Such shares were knocked down to the appellants for certain sums. Before they were knocked down to them, the respondent, the holder of the decree in execution of which such shares were being sold, and a co-sharer in such undivided immoveable property, advanced the same sums, and his bids were recorded by the officer conducting the sale. On the sale of the property the respondent filed a receipt for the purchase-money of the first sale, and as regards the purchase-money of the second sale conformed himself to the provisions of ss. 306 and 307 of Act X. of 1877. The appellants also carried out the provisions of those sections as regards the purchase-money of both sales. The respondent had obtained the permission of the Court executing the decree to bid for and purchase the property. The respondent subsequently claimed, under s. 310 of Act X. of 1877, that the sales of such shares should be confirmed in his favour. The appellants objected, claiming that the sales should be confirmed in their favour. The Court executing the decree allowed the application of the respondent, and disallowed the objections of the appellants, and made an order confirming the sales in favour of the respondent, having regard to the provisions of s. 310, Act X. of 1877.

*First Appeal, No. 161 of 1880, from an order of Maulvi Zain-ul-abdin Khan, Subordinate Judge of Sháhjahánpur, dated the 28th June, 1880.

On appeal it was contended on behalf of the appellants that the order confirming the sales in favour of the respondent was illegal, inasmuch as the respondent as the holder of the decree, having obtained permission of the Court executing the decree to bid for and purchase the property in dispute, ought not to be allowed to take advantage of his right of pre-emption, but ought to take his chance with other bidders; and inasmuch as he had not carried out the provisions of ss. 306 and 307 of Act X. of 1877, as a pre-emptor could not be allowed to set off purchase-money against the amount of the decree.

Pandit *Nand Lal*, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Shah Asad Ali*, for the respondent.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.), was delivered by

SPANKIE, J.—It is very doubtful whether there was any appeal at all. Appellant is the auction-purchaser, so that he cannot be said to be appealing from an order under s. 244, Act X. of 1877. The sale was confirmed by the lower Court, but the appeal is not directed to any ground under paragraph 1, s. 312, or s. 313, nor can it be regarded as an appeal from an order under s. 294, since the decree-holder had permission to bid though he did not purchase, but, after the purchase by appellant, claimed as pre-emptor under s. 310. The order is not appealable under cl. (16), s. 588, Act X. of 1877, and there is no appeal by that section against an order under s. 310. We dismiss the appeal and affirm the order with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

BADAM (DEFENDANT) v. IMBAT AND ANOTHER (PLAINTIFFS).*

Remand under s. 562 of Act X of 1877 (Civil Procedure Code)—Extent of appeal from order of remand.

An appeal from an order on appeal remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the

* First Appeal, No. 116 of 1880 from an order of H. G. Keene, Esq., Judge of Meerut, dated the 22nd July, 1880.

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provisions of s. 562 of Act X. of 1877 or not, but the question whether the decision of the appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.

THE plaintiffs in this suit claimed to be maintained in possession of a share in a certain thoke in a certain village, and to have a decree dated the 29th March, 1880, set aside as collusive and fraudulent. They alleged in their plaint that such share had been put up for sale in execution of a decree against their deceased father, Sheo Lal, and had been purchased by one Nand Ram; that Nand Ram had nominally sold such share to one Disa and certain other persons for Rs. 2,500, the instrument of sale being date the 5th March, 1879; that the defendant in this suit, Badam, a share-holder in the plaintiffs' village, sued to enforce a right of pre-emption in respect of such sale, and collusively and fraudulently obtained a decree on the 29th March, 1880; that they, as sons of Sheo Lal and co-sharers in the same thoke, had a preferential right to purchase such share under the terms of the *wajib-ul-arz*, the defendant being a co-sharer in another thoke; and that they were in possession of such share notwithstanding the defendant's decree. The defendant set up as a defence to the suit that it was barred by limitation; and that he was a co-sharer in the same thoke as Sheo Lal, and the plaintiffs had therefore no preferential right of purchase. The Court of first instance, treating the suit as one to enforce a right of pre-emption, held that, as the plaintiffs were in possession, the period of limitation began to run either from the date of the execution of the deed of sale, the 5th March, 1879, or the date of the registration of that instrument, and as more than one year had elapsed from those dates at the time the suit was instituted, the suit was barred by limitation under No. 10, sch. ii of Act XV of 1877. On appeal by the plaintiffs the lower appellate Court held that the suit was not one to enforce a right of pre-emption, but to set aside a decree fraudulently obtained, and therefore No. 95, and not No. 10, sch. ii of Act XV of 1877, was applicable; and that the suit was within time, as although it was not stated in the plaint when the fraud became known to the plaintiffs it could not have become known earlier than the date of the decree impeached, and three years had not elapsed from that date. The lower appellate Court, in accordance with

these rulings, remanded the case for retrial, observing that the issues were, Was the decree obtained by fraud to which the other side was a party? If so, can any relief accrue to the plaintiffs, and if so, what?

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The defendant appealed to the High Court on the ground (i) that the suit was barred by limitation, as the period of limitation should be computed from the date of the deed of sale; and (ii) that the lower appellate Court was wrong in holding that the suit was not one to enforce a right of pre-emption. The appeal came for hearing before Spankie, J., and Straight, J., and those learned Judges referred to the Full Bench the question whether an appeal from an order of remand should or should not be confined to the point whether such order was or was in conformity with the provisions of s. 562 of Act X of 1877. The order of reference was as follows:—

SPANKIE, J.—This is an appeal from an order of remand under s. 562 of Act X of 1877 in a regular suit. The plaintiff sued to be maintained in possession under right of pre-emption, in accordance with the terms of the village administration-paper and on payment of Rs. 2,500, by setting aside what is called in the plaint a collusive decree of the 29th March of the present year. The defendant contended that the suit was barred by limitation, and that he also was a sharer in the vendor's thoke, and consequently had a right to purchase the property, the plaintiff having no preference. The first Court, referring to the deed of sale, found that it was dated the 5th March, 1879, and declared that, if the plaintiff himself was in possession of the holding of which the property sold forms a part, then the period of one year should begin to run from the date of execution of the sale-deed or from the date of registration, whereas the plaintiff sought to compute the period of limitation from the 29th March, 1880, the date of the decree which he sues to set aside. This computation was not included in art. 10, sch. ii of Act XV of 1877. The Subordinate Judge therefore held the suit to be barred by limitation, and without going further into the case dismissed the claim. In appeal the Judge held that the suit was not confined to a claim to enforce the right of pre-emption, but its main object was to set aside a decree which had been according

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to plaintiff's averment obtained by fraud. But art. 95, sch. ii of the Limitation Act and not art. 10 would govern the claim, and it allowed three years from the time when the fraud became known to the plaintiff. The Judge further held that there was some doubt as to when the fraud became known; and he framed two issues for the Court below to determine, reversing the decree of the first Court, and directing that the suit should be restored to the file and retried. This was the order from which the present appeal has been instituted. The contention of appellant is that as plaintiff's own showing was that limitation should commence from the date of the sale-deed, the Judge's order was not maintainable, and that the Judge was wrong in ruling that the suit was not one to enforce the right of pre-emption; the claim to set aside the decree cannot alter the character of the suit. Hitherto I have entertained the opinion that the appeal allowed in such a case as this is one confined to the order of remand under s. 562 of Act X of 1877. I give the terms of that section in the margin (1). From those terms I gather that, when there is an appeal to this Court from an order of remand, the appellant ought to show that the appellate Court, in reversing the order on the preliminary point, had erroneously found that the Court against whose decree the appeal below had been made had disposed of the suit upon a preliminary point *so as to exclude evidence of fact* which appeared to the appellate Court essential to the determination of the rights of the parties. If no such evidence had been excluded, but was to be seen in the record, and was sufficient to enable the appellate Court to pronounce judgment, then that Court should have acted under s. 565 and "finally determined" the case. For, except as is provided in s. 562, it is declared by s. 564, that the appellate Court shall not remand a case for a second decision. In appealing then from the order of remand, I think it should be shown that a remand had been made contrary to the provisions of s. 562. I find it difficult to hold that we are at liberty, when the order of remand is appealed, to consider the propriety of the appellate Court's ruling with respect to

(1) If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essen-

tial to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, &c., &c.

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the preliminary point, or to go into the merits of the case. So far as the appellate Court's ruling touches these points, I would say that it is open to question whenever the case comes before this Court as a second appeal, but not now in the form of an appeal from the order of remand. It is true that the Courts are bound to dispose of a question of limitation, even when limitation is not set up as a defence. But Illustration (a), s. 4 of Act XV of 1877, shows how this works :—"A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The appellate Court *must dismiss the suit.*" So here, finding the suit not to be barred, but believing the state of the record to be such as that described in s. 562, the Judge remands it to be tried on the merits. Had he found it to be barred by limitation, he would have dismissed the suit, and his decree might have come up in second appeal. So his ruling now on the point of limitation may hereafter come up for consideration, when the case has been retried, but the point for us now to determine is whether the order of remand (not the ruling in the case) is opposed to, or in conformity with, the provisions of s. 562. If I am right as regards the first plea in appeal, it is obvious that the second plea is not one for us to determine at this stage of the case, and I would hold in this appeal that it must be dismissed, as the Judge appears to have acted in accordance with the provisions of s. 562.

I learn, however, and from examination of the judgments find that a different view has been expressed by a Division Bench of this Court (1). I am unwilling to rule contrary to those decisions without giving all my honorable colleagues an opportunity of expressing their opinions on the point, and I am therefore prepared, should Mr. Justice Straight wish it, to refer the question to the judgment of the Full Bench.

STRAIGHT, J.—As I was a party to both the decisions referred to by my honorable colleague, and as I have since concurring in them had reason to doubt their correctness, I entirely concur in the proposed reference to the Full Bench.

(1) First Appeal from Order No. 18 decided the 20th July, 1880; not reported. of 1880, decided the 25th May, 1880; and First Appeal from Order No. 69 of 1880,

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Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Babu *Baroda Prasad Ghose*, for the respondents.

The following judgments were delivered by the Full Bench :—

PEARSON, J. (STUART, C. J., OLDFIELD, J., and STRAIGHT, J. concurring).—The lower appellate Court's order of remand is based upon its ruling that the suit is not barred by limitation ; and it appears to us impossible to hold that the defendant in appealing against that order is debarred from pleading that the ruling on which it is based is erroneous, or that this Court is precluded from considering and disposing of the plea. Nor do we find anything in the law to warrant the conclusion that the appellant is so debarred or the Court so precluded. It is reasonable to suppose that the main object of allowing an appeal from an order of remand was to admit of a determination by the superior appellate Court, as to the correctness of the lower appellate Court's adjudication on the preliminary point on which the Court of first instance disposed of the case before effect had been given to the order of remand. That object would be defeated if the appellant were restricted to pleading that the remand had been made contrary to the provisions of s. 562 of the Procedure Code, and forbidden to urge the more vital and radical objection to the correctness of the adjudication on the preliminary point. We cannot think that the sole object of the appeal allowed was to prevent remands being made contrary to the provisions of the section. But if the appellant is competent to object to the ruling on the preliminary point, the Court is bound to dispose of the objection, which, if not allowed, might be held to be disallowed, and not to be renewable in appeal subsequently preferred from the decree of the lower appellate Court in the case. The ruling in the present instance that the suit is not barred by limitation may or may not be correct, but, on the hypothesis that it is not correct, it is obviously expedient that the remand order should be quashed at once, and equally undesirable that the time and labour of the lower Courts should be wasted and the parties further harrassed by the protracted investigation of a suit which is barred by limitation.

SPANKIE, J.—I have heard nothing that alters the opinion expressed in my order of reference. I am not impressed by the authorities cited. The ruling in *Mussamat Mitna v. Syed Fazlurub* (1) can hardly be said to be in point. That decision refers to a case in which a remand order had been made in special appeal. It rules that, where a review of judgment had not been obtained within the prescribed time, the decision of any points of law determined in the order of remand would be conclusive, and could not be questioned in a second appeal. To this I do not object. The Court hearing a special appeal has to determine points of law erroneously held by the lower appellate Court, and its ruling would be, when not set aside by itself, final. But I cannot understand that the Legislature, by allowing an appeal from an order of remand under s. 562, intended in such cases to alter the channel of appeal. If it did so intend, it enables an appellant to obtain by a summary appeal a ruling that sooner or late may have to be questioned in second appeal. As I pointed out in the case before us, had the Judge held the suit to be barred by limitation, he would have made his decree, which might at once have been questioned in second appeal, and so, had he gone on as he ought to have done and heard the case on the merits. Assuming there was evidence on record, he would have, as to the facts, made a decree which also (as he had ruled the point of law as to limitation) would have been carried up to this Court in second appeal. Whereas, if the Judge on hearing an appeal remands a case to be tried on the merits, which he ought to have tried in his own Court, and in regular miscellaneous appeal his order is reversed, litigation is prolonged, and there still may be in due course a second appeal upon other grounds than one of mere limitation. If the ruling of the Court on hearing an appeal from an order under s. 588 is to be decisive on all points in a case, in which there has been a remand by the Court below, then a litigant obtains relief at very much less cost than other litigants can do, where there has been no remand, which seems injurious to the pecuniary interest of the State, as well as unreasonable and inconsistent as regards to suitors.

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(1) 6 B. L. R., 148.

APPELLATE CIVIL.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,
Mr. Justice Oldfield, and Mr. Justice Straight.*

GAYA PRASAD AND ANOTHER (PLAINTIFFS) v. SALIK PRASAD AND
OTHERS (DEFENDANTS).

GAYA PRASAD (DEFENDANT) v. GAYA PRASAD AND ANOTHER (PLAIN-
TIFFS).*

*Mortgage—First and second mortgagees—Purchase of mortgaged property
by mortgagee.*

G, the mortgagee of certain property, having purchased a portion thereof, sued (i) the mortgagor, (ii) *P*, to whom another portion of such property had been mortgaged before such property had been mortgaged to *G*, and who had purchased such portion subsequently to the mortgage of such property to *G* and *G*'s purchase, and (iii) *M*, who had purchased a third portion of such property subsequently to *G*'s purchase, for the enforcement of his lien on such property.

Held by STUART, C.J., OLDFIELD, J., and STRAIGHT, J. (PEARSON, J., dissenting) that, inasmuch as it was the manifest intention of *P* to keep his incumbrance alive, and for his benefit to do so, *P*'s purchase did not extinguish his incumbrance, and he was entitled, as prior incumbrancer, to resist *G*'s claim to bring to sale the portion of the mortgaged property purchased by him.

Held also by OLDFIELD, J., and STRAIGHT, J. (PEARSON, J., dissenting) that *G*, notwithstanding he had purchased a portion of the mortgaged property, might throw the whole burden of his mortgage-debt on the portions of the mortgaged property in the mortgagor's possession and in *M*'s possession, but he could not have thrown it on the portion of such property in *P*'s possession.

ON the 6th December 1866, defendant No. 1 in this suit, Salik Prasad, gave the plaintiffs in this suit a bond for Rs. 5,000 payable with interest at twelve per cent. per annum within two years. As collateral security for the payment of this money he hypothecated the following properties:—Two houses situate in mohalla Mirganj in the city of Allahabad; a *mandavi* (market-place) known as Salikganj situate in mohalla Motiganj in the same city; a house situate in mohalla Johnstonganj in the same city; a house situate in Mandui Rani in the same city; and three shops situate in the aforesaid mohalla Motiganj. On the 26th September 1867, defendant No. 1 sold and conveyed to the plaintiffs one of the houses in Mirganj. On the 27th May 1873, he

* First Appeals, Nos. 13 and 10 of 1880, from a decree of J. B. Thomson, Esq., Judge of the Court of small Causes at Allahabad, and invested with the powers of a Subordinate Judge, dated the 8th September 1879.

sold and conveyed to defendant No. 3 in this suit, Ganesh Prasad, the shops in Motiganj. These shops had been previously hypothecated to defendant No. 3 by a deed dated the 1st January 1866, which contained a condition against alienation. Such sale was made to defendant No. 3 in satisfaction of such hypothecation. On 7th May 1874, defendant No. 1 sold and conveyed to defendant No. 2 in this suit, Maddu, the house in Johnstonganj. On the 5th December 1876, he sold and conveyed to defendant No. 4 in this suit, Gaya Prasad, the house in Mandui Rani. That house had been previously hypothecated to defendant No. 4 by a deed dated the 4th January 1866, which contained a condition against alienation. Defendant No. 4 had sued upon that deed and obtained a decree enforcing such hypothecation. Instead of taking out execution of this decree he took the deed of sale of the 5th December 1876. In June 1879, the plaintiffs brought the present suit against defendants Nos. 1, 2, 3, and 4, in which they claimed the amount due on the bond of the 6th December 1866, Rs. 11,654-8-9, asking that the defendants might be ordered to pay that amount to them, and that, in the case of their failing to pay the same, they (plaintiffs) should be authorized to realize the amount from the defendants, by the attachment and sale of the property hypothecated in that bond, excepting so much thereof as the plaintiffs had themselves already purchased. Defendant No. 2 set up as a defence to this suit, *inter alia*, that, the plaintiffs having themselves purchased a portion of the property, their lien ought not to be enforced to its full extent against the rest of the same. Defendants Nos. 3 and 4 set up a like defence, and further contended that, as the portions of the property which they had purchased had been mortgaged to them previously to their mortgage to the plaintiffs, and had been purchased by them in satisfaction of their mortgage-debts, such portions of the property were not liable to be resold in satisfaction of the subsequent lien of the plaintiffs; and that they were not liable for the whole amount claimed by the plaintiffs, but were liable only to the extent of the value of the portions of the property purchased by them. The Court of first instance fixed the following issues, amongst others, for trial :—“(i) Are the properties now sought to be brought to sale each liable in full of the amount due on the bond or only proportion-

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GAYA PRA- (ii) Can the properties of defendants Nos. 3 and 4 be brought to
SAD sale under this bond, or are they liable to exemption by reason of
v. prior hypothecation or other condition in the respective deeds by
SALIK PRA- which they were hypothecated"? The Court held upon the first of
SAD. these issues that the properties sought to be brought to sale were
GAYA PRA- only liable proportionately and jointly with all the properties origi-
SAD nally hypothecated. Upon the second of these issues the Court held
v. that the properties purchased by defendants Nos. 3 and 4 were
SAD. liable to be brought to sale under the bond in suit, but that, inas-
much as the prior hypothecations of such properties to them were
not extinguished by their purchase of such properties, defendants
Nos. 3 and 4 were entitled to have their respective liens satisfied.
It observed on this point as follows :—"All therefore that the
equity of this case demands is that defendants Nos. 3 and 4 are
entitled to have their respective liens satisfied : plaintiffs can pur-
chase them and make their own lien the first charge on the proper-
ties, or can bring to sale these properties subject to the liens of
defendants Nos. 3 and 4, who are at liberty to redeem on paying
their proportionate share of plaintiffs' lien and so acquire full title
to the properties." The decree of the first Court declared that the
plaintiffs were entitled to bring to sale the properties sought to be
brought to sale, subject to the condition that each property should
only be liable for a proportionate share of the decree valued accord-
ing to the proportion its value bore to the rest of the properties ori-
ginally hypothecated, and that the owners were entitled to come in
and redeem on payment of such proportionate share, and that in
the case of defendants Nos. 3 and 4 the properties should be sold
subject to their respective prior liens. The plaintiffs and defendant
No. 4 appealed to the High Court from this decree, and defendant
No. 3 preferred objections to it under the provisions of s. 561 of
Act X of 1877. On behalf of the plaintiffs it was contended that
the Court of first instance was wrong in making the hypothecated
properties liable for a proportionate share only of the debt due to
them, particularly the house in Johnstonganj bought by defendant
No. 2; that the purchases by defendants Nos. 3 and 4 had extin-
guished their prior liens, and they held the properties respectively
purchased by them subject to all liens existing at the time of pur-

chase; and that the entire amount of the decree was leviable from defendant No. 1 personally and from the hypothecated property in his possession. On behalf of defendants Nos. 3 and 4 it was contended that the properties purchased by them were not under any circumstances liable to be resold; and that the relative value for which each property was liable should be determined. The two appeals, numbered 13 and 10 of 1880, respectively, came on for hearing together before Pearson, J., and Oldfield, J.

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The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the appellants.

The *Senior Government Pleader* (Lala Juala Prasad), Pandit Bishambhar Nath, and Babu Oprokash Chandar Mukarji, for the respondents, in No. 13.

Mr. Conlan and Pandit Bishambhar Nath for the appellant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the respondents, in No. 10.

OLDFIELD, J.—(After stating the facts and observing that the principal questions were (i) whether the plaintiffs, having bought part of the properties mortgaged to them as security for the debt due to them, could enforce their lien to its full extent against the rest of the security in the hands of the defendants, and (ii) whether defendants Nos. 3 and 4, having held prior mortgages on some of the properties mortgaged to the plaintiffs, and having bought the same in satisfaction of their mortgage-debts, such properties were liable to be resold to satisfy the subsequent charge of the plaintiffs, continued as follows):—The material questions are the two which have already been noticed. As to the first of them, the rule that a mortgagee, who has purchased the mortgagor's rights in a part of the property mortgaged to him, is not entitled to throw the whole burden of the mortgage-debt on the remaining portion in the hands of a *bona fide* purchaser for value, may certainly be applied to the case of defendants Nos. 3 and 4, who had mortgages on some of the properties mortgaged to plaintiffs before the plaintiffs became purchasers, otherwise the value of their security would be diminished by the plaintiffs' purchase, but it is not applicable to the cases of Salik Prasad, defendant No. 1, and Maddu, defendant

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No. 2. The former is the original debtor and mortgagor, and defendant No. 2 is a purchaser from him of some of the property mortgaged to the plaintiffs after the plaintiffs had bought some other part of the property mortgaged to them. Here the purchase made by the plaintiffs for value as between them and the mortgagor only diminished the security they originally held for this debt, but the entire property mortgaged remaining in the hands of the mortgagor remained still as a security and liable for the whole debt; and a person buying any of it from the mortgagor after the plaintiffs' purchase would ordinarily take with the same liability; that is the case of *Maddu*, defendant No. 2. It would have been different had he purchased before the plaintiffs broke up their security, for plaintiffs could not be allowed by their subsequent purchase to affect the value of his prior purchase by throwing on it the whole burden of their debt. That was the position of the parties in the case of *Keshri v. Roshan Lal* (1); followed by the Calcutta High Court in *Nathoo Sahoo v. Ameer Chand* (2). The facts of the other cases are not given in the reports so as to enable us to ascertain what the respective equities of the parties were. The second question is one of some difficulty. We have to determine (i) if the sale to a mortgagee of property mortgaged as security for a debt in satisfaction of that debt operates to extinguish the mortgage; and (ii) if not what are the rights of the purchaser against subsequent incumbrancers. The question has been ably examined by the Subordinate Judge, and I concur with him on the first point. The rule may be taken to be that, when it is the manifest intention of the mortgagee to keep alive the mortgage, or it is for his benefit to do so, it should be held that it subsists after the purchase. That was held by this Court in *Lachmi Narain Tewari v. Koteswar Nath Tewari* (3), and is supported by the case of *Ramu Naikan v. Subbaraya Mudali* (4); and the principle seems an equitable one. In Story's Equity Jurisprudence, 11th ed., s. 1035c., it is said: "The rule (that the mortgage will be deemed extinguished) is not, however, inflexible, and may be controlled by the express or implied intention of the parties; and where it is manifestly for the interest of the person in whom both the legal and

(1) N.-W. P. H. C. Rep., 1868, p. 88.

(3) I. L. R., 2 All., 826.

(2) 24 W. R., 24.

(4) 7 Mad. H. C. R., 229.

equitable titles unite to keep the incumbrance alive, there Courts of Equity will imply an intention to keep it alive, unless the other circumstances of the case repel such a presumption." Applying such a rule as the one above given, there can be no doubt that, in the present cases, the mortgages should be held to be subsisting, and the mortgage subsists for the benefit of the purchaser, and it seems to me to follow as a consequence that he will be entitled to resist a resale of the property by a subsequent incumbrancer until his mortgage-debt is satisfied, the subsequent incumbrancer being entitled to redeem the prior incumbrance and so obtain the first charge on the property. The same principle that the mortgage is not extinguished but subsists for the benefit of the mortgagee after his purchase underlies the decisions of this Court, where in cases of sale in execution of decrees at the instance of the mortgagee, when he himself becomes the purchaser, he is allowed the benefit of the mortgage against subsequent incumbrancers. There is an unreported decision of this Court (S. A. No. 159 of 1876), dated 21st August 1876, to which I was a party, where a prior mortgagee, who had privately purchased the equity of redemption, sued to prevent a subsequent mortgagee bringing to sale the property. It was held that he could not defeat the subsequent mortgagee's lien, and the sale was allowed subject to the plaintiffs' right to redeem the subsequent mortgage. I am still of opinion that the sale could not defeat the lien of the subsequent mortgagee, but on fuller consideration I think the decision cannot be supported so far as it may have decided that the prior mortgage had become extinguished. In the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (1) it was held that "claimants subsequently to the security have a right to pay off the debt on account of which the estate was sold and to treat the purchaser as the owner of the estate subject to their own claim"; and it was declared that on their paying the debt due to the prior incumbrancer they would become holders of the first charge on the property (2). I am of opinion therefore that in this case there should not be an order declaring the plaintiffs entitled to resell the properties, and I would dismiss the plaintiffs' claim against defendants Nos. 3 and 4. The plaintiffs' contention that

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(1) 23 W. R., 338. (2) Tagore Lectures, 1876, Mortgage, pp. 102—107.

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PEARSON, J.—Not a little embarrassment in dealing with this case is caused by the conflicting decisions brought to our notice on the main questions involved in it. I confess that I am strongly impressed by the reasoning contained in the judgment of Turner and Oldfield, JJ., in S. A. No. 159 of 1876, decided on the 21st August 1876 (1), and in the reply of Turner, J., dated 2nd June 1876, to the reference made to the Full Bench in *Khub Chand v. Kalian Das* (2). That reasoning constrains me to hold that the defendants Ganesh Prasad and Gaya Prasad purchased only the rights and interests of Salik Prasad subsisting at the dates of the purchases in the properties purchased by them; or in other words, that they purchased the properties subject to the plaintiffs' lien; and, moreover, that their own pre-existing liens were extinguished by their purchases. From this point of view it seems to me that they are not legally in a better position than the defendant Maddu, and that none of the defendants can demand that any portion of the mortgage-debt due to the plaintiffs should be assessed on the property purchased by the latter: although the plea urged in the third ground of Gaya Prasad's appeal may equitably merit consideration. I would allow the plaintiffs' appeal and in modification of the lower Court's decree, would decree the claim with the proviso that in the first instance the hypothecated properties still in the possession of Salik Prasad, and, only in the event of the sale-proceeds thereof being insufficient to discharge the judgment-debt, the properties purchased by the other defendants be brought to sale. The plaintiffs are, in my opinion, entitled to their costs in both Courts.

(1) Unreported. (2) I. L. R., 1 All., 240.

In consequence of this difference of opinion between Pearson, J., and Oldfield, J., the appeal was referred, under the provisions of s. 575 of Act X of 1877, to Stuart, C.J., and Straight, J. The following judgments were delivered by those learned Judges:—

STUART, C.J.—This case first came before Pearson, J., and Oldfield, J., sitting as a Division Bench, but as they differed in opinion the case was referred under s. 575 of the Procedure Code to Straight, J., and myself. The legal question raised is one of very great importance, and it has been rendered more difficult in the present case by the numerous transactions which have taken place among the parties and the complexity of the circumstances relating to them. Much, however, that is detailed in the pleadings and in the judgment of the lower Court is unnecessary, in my view, for the purpose of the one legal question to which we must find an answer, that question being, I may at once state, simply this—Can a second mortgagee recover against the mortgaged property, passing by and irrespective of a first mortgage, the first mortgagee having, since the date of the second mortgage, acquired by purchase the equity of redemption from the mortgagor? I prefer to put the question in that way, simply, without reference to the law of merger or any of the other legal subtleties which were imported into the argument at the hearing before us; for I have after much consideration arrived at the conclusion that we may apply a solution to it on principles of justice, without allowing ourselves to be trammelled by the refinements which have been developed in the English Courts by the ingenuity of conveyancers and real property lawyers.

The plaintiffs-appellants are the holders of a mortgage-bond executed by Salik Prasad, dated the 6th December 1866, in which certain properties detailed at the end of the deed are hypothecated, and they claim, on failure of the mortgagor to repay the consideration-money within the time stipulated in their mortgage-bond, to realize the amount by establishment and enforcement of their mortgage-right, by means of attachment and sale of the mortgaged property. It appears, however, that Salik Prasad, the mortgagor, had in the preceding January of the same year executed two other mortgage-bonds, one dated the 1st Janu-

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ary 1866, and the other dated the 4th January 1866. In both of those bonds a considerable portion of the property detailed in the plaintiff's deed was hypothecated, and subsequently the equity of redemption sold to both mortgagees by separate sale-deeds, the one dated the 27th May 1873, and the other dated the 5th December 1876, the present suit having been instituted on the 5th June 1879. In this suit the plaintiffs claim to recover against the whole property detailed in their deed, including that previously hypothecated in the two bonds last named, on the plea (derived from the plaintiffs' reading of the law of England on the subject) that the sales of the equity of redemption had in both cases the legal effect of merging the debt in the property so acquired, leaving it open to them to sue as being under the circumstances the only remaining incumbrancers. Pearson, J., was of opinion that what was sold by the two sale-deeds must be understood to have been merely the rights and interests of the mortgagor, and that his rights and interests were purchased subject to the plaintiffs' lien. Oldfield, J., on the other hand, agreeing with the Subordinate Judge, was of opinion that the sale of the equity of redemption had not the effect of merging the mortgage-debts in the property sold, but that, on the contrary, the mortgage subsisted in priority to the plaintiffs' hypothecation; and I am of the same opinion. The contrary opinion appears to be founded on a very narrow view of the English mortgage law in respect of merger on the assumption, apparently, that such law must be understood to apply to similar transactions in this country. But such an assumption appears to have no sufficient foundation on any public recognition of it binding on this Court, and as it would, in my judgment, operate most unjustly in the present case, I must disregard it, preferring the simpler and more liberal rule of the Roman Law which, in such a case as the present, recognized the right of a prior mortgagee against the claim of a puisne incumbrancer, and this appears to be the law favoured by the American Courts, for in Story's Equity Jurisprudence, 11th ed., s. 1035c., it is stated, "The rule (English rule), however, is not inflexible, and may be controlled by the express or implied intention of the parties; and where it is manifestly for the interest of the person in whom both the legal and equitable titles unite to keep the incumbrance

alive, there Courts of Equity will imply an intention to keep it alive, unless the other circumstances of the case repel such a presumption. The same doctrine, with the like qualifications, will apply to the case where an assignee of a mortgage purchases the equity of redemption or the assignee of an equity of redemption purchases and takes a conveyance of the mortgage." There would appear to have been a conflict of opinion on this subject in the three other High Courts of Calcutta, Madras, and Bombay, the Courts of Calcutta and Bombay apparently applying the rigorous English law, and that of Madras the doctrine of the Roman Law as the rule, and one to which the minds of English Judges are gradually tending, as some recent English cases show. The law I would thus apply to the present case must, however, not be used so as to injure or prejudice a subsequent mortgagee. In fact, in such a case as this, it simply has the effect of leaving the parties where they were at first, the prior mortgagees being entitled to enforce their security notwithstanding the sale to them of the equity of redemption, and the subsequent or puisne incumbrancer being, in respect of the property, what he was at the date of his own bond, whatever that was worth, neither more nor less.

STRAIGHT, J.—This is a reference to the learned Chief Justice and myself under s. 575 of Act X of 1877, in consequence of a difference of opinion between Pearson, J., and Oldfield, J., the Division Bench hearing the original appeals from the decision of the Subordinate Judge of Allahabad, dated the 8th September 1879. The parties to the suit are Gaya Prasad and Kashi Prasad, plaintiffs, and Salik Prasad, defendant No. 1, Maddu, defendant No. 2, Ganesh Prasad, minor defendant No. 3, and Gaya Prasad, defendant No. 4. The facts out of which the questions in issue between the parties have arisen appear to be as follows:—Defendant No. 1 was the owner of several properties situated in Allahabad. On the 1st January 1866, he mortgaged certain shops in Motiganj to defendant No. 3, and on 7th May 1873, he transferred them to him by a registered deed of sale. On the 4th January 1866, the same defendant No. 1 mortgaged a puoca house in mohalla Bani Mandui to defendant No. 4. On the 6th December

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1881 1886, he again mortgaged the same house with other property to the plaintiffs, the condition of such mortgage being that it should be redeemed by the 6th December 1868. On the 26th September 1867, defendant No. 1, by a registered sale-deed, conveyed to the plaintiffs one of the pucca houses in mohalla Mirganj already mortgaged by him to them. Defendant having failed to satisfy his mortgage of the 4th January 1866 to defendant No. 4, a suit was brought upon it and a decree passed in favour of the mortgagor for enforcement of his right against the house in Rani Mandui, and in execution of decree its sale was advertized for the 6th December 1876. Upon the 5th December 1876, defendant No 1 came to his mortgagee-defendant No. 4, and in part satisfaction of the decree privately sold the house to him for Rs. 1,950, taking a fresh bond for the balance remaining due. It therefore comes to this that defendant No. 4 was a first mortgagee of the house in Rani Mandui, and the plaintiffs second mortgagees of it with other properties. In like manner as defendant No. 4 has become the purchaser of the property mortgaged to him, so have the plaintiffs brought up the equity of redemption in the house in mohalla Mirganj. The present suit is based upon the mortgage of the 6th December 1866, and the plaintiffs seek to realize the whole amount of it by establishment and enforcement of their mortgage right, and by attachment and sale of such portions of the mortgaged properties as are in the hands of defendants Nos. 2, 3, and 4, the house in mohalla Mirganj originally mortgaged and since purchased by them being exempted. Defendant No. 1 confessed judgment. Defendant No. 2 set up as a defence to the claim his purchase from defendant No. 1 by a registered sale-deed of the house in Johnstonganj on the 7th May 1874. Defendant No. 3 asserts a mortgage of the shops in Motiganj on the 1st January 1866, and a subsequent sale to him on the 27th May 1873. Defendant No. 4 also put forward his mortgage of the Rani Mandui house of the 4th January 1866, and the registered sale-deed respecting the same property of the 5th December 1876. It was also contended generally on behalf of defendants Nos. 2, 3, and 4, that the mortgage-deed of the plaintiffs was collusive and without consideration; that the accounts between the plaintiffs and defendant No. 1 were fictitious and incorrect; and

that payments by the latter to the former had been appropriated to wrong accounts. The case was most carefully considered by the Subordinate Judge and disposed of by him in a singularly able judgment. With regard to the genuineness of the bond, the correctness of accounts, and the question of appropriation, he decided them all in favour of the plaintiffs, and so far as these matters are concerned, no appeal was preferred to this Court. But upon the substantial issues in the suit he held, first, that each of the mortgaged properties was only proportionately liable to the claim of the plaintiffs according to its value, and that, in estimating that proportion, the original share borne to the mortgage by the property of which the plaintiffs had become purchasers must be brought into account: secondly, that though defendants Nos. 3 and 4 were purchasers of the properties originally mortgaged to them, their position as mortgagees had not merged in that of proprietors, so as to extinguish their original securities. The Subordinate Judge accordingly decreed the plaintiffs' claim in these terms:—"I decree the claim for Rs. 4,853, with interest at 12 per cent. up to date of decree from the 26th September 1867, and costs against defendant No. 1, and I declare plaintiffs entitled to bring to sale the properties entered in the claim, subject to this condition, that each property shall only be liable for a proportionate share of the decree valued accordingly to the proportion its value bears to the rest of the properties originally hypothecated, the owners being also declared entitled to come in and redeem on payment of such proportionate share, and, in the case of defendants Nos. 3 and 4, the properties to be sold subject to their respective prior liens."

From this decision of the Subordinate Judge both the plaintiffs and defendant No. 4 appeal to this Court, defendant No. 3 filing objections under s. 561, Act X of 1877. The grounds urged by the plaintiffs-appellants are, in substance, (i) that the Subordinate Judge was wrong in declaring defendant No. 1 only liable to pay a proportionate amount of the original debt in respect of the mortgaged property now in his possession, for he reserved it to satisfy the debt due from him in respect of the mortgage on which the suit is brought; (ii) that the property sold to plaintiffs by

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1881 defendant No. 1 was conveyed to them free of all incumbrances, and should therefore not be brought into account in order to calculate what is due from the defendants respectively; (iii) that defendants Nos. 3 and 4 purchased subsequently to the plaintiffs' mortgage, and they cannot free themselves from liability by payment of the proportionate amount decreed by the lower Court, nor can they now fall back on any former lien they may have possessed, the several properties in their hands are responsible for the entire debt due under the plaintiffs' mortgage; (iv) that as to defendant No. 2, he being a purchaser of one of the mortgaged properties after the hypothecation and sale of it to the plaintiffs is in the same position as defendant No. 1, and can have no defence to the suit. Defendant No. 4, whose position is admittedly identical with that of defendant No. 3, in his appeal urges (i) that, as he purchased the house in Rani Mandui in satisfaction of his prior lien under the mortgage of the 4th January 1866, and the charge now set up by plaintiffs was taken subsequently thereto, and with full knowledge of a condition in the first mortgage against alienation, that they are precluded from enforcing their lien; (ii) that the authorities relied upon by the Subordinate Judge are inapplicable to the present suit; (iii) that the Subordinate Judge should have ordered that portion of the mortgaged property in the hands of defendant No. 1 to be first brought to sale, and only in the event of the proceeds of such sale proving insufficient to discharge plaintiffs' claim to direct the balance to be realized rateably from the property held by defendant No. 4. The petition of objections filed by defendant No. 3 was couched in similar terms and urged like points to those contained in the grounds of appeal of defendant No. 4. The case in this Court was argued before Pearson, J., and Oldfield, J., who on the 26th July last delivered judgment. Pearson, J., was of opinion that the appeal should be decreed, and that the plaintiffs' claim as brought should be allowed with this proviso, that such portions of the mortgaged property as remained in the hand of defendant No. 1 should be first brought to sale, and only in the event of the sale-proceeds thereof being insufficient to discharge the judgment-debt should recourse be had to the properties in the hands of the other defendants. Oldfield, J., differed, considering that there should not be an order

declaring plaintiffs entitled to resell the properties, and that, as regards defendants Nos. 3 and 4, the suit should be dismissed with costs. He held, however, that the claim of the plaintiffs against defendant No. 1 personally and the mortgaged property in his possession, and against the mortgaged property purchased by defendant No. 2 should be decreed in full with costs.

No question arises upon this reference to the learned Chief Justice and myself in respect of defendant No. 2, and the points upon which the difference in opinion has occurred between my two honourable colleagues relate to the claim of the plaintiffs as against defendants Nos. 3 and 4. The material questions for consideration would appear to be, (i) Did the defendants Nos. 3 and 4 by their several purchases on the 27th May 1873, and 5th December 1876, of the properties respectively mortgaged to them by defendant No. 1 on the 1st and 4th January 1866, extinguish their securities, and take upon themselves the liabilities of the mortgagor to charges created on the same properties by the mortgagor subsequently to their own mortgages; (ii) Assuming that the defendants Nos. 3 and 4 are so liable, must not the plaintiffs, having broken up their mortgage of the 6th December 1866, by purchasing part of the property mortgaged to them, be required to bring the proportionate value of such property to the original mortgage into calculation in order to estimate what amount rateably to it the other properties in the hands of defendants Nos. 3 and 4 should contribute?

With regard to the first of these two points, there is no little difficulty to discover from the authorities any very precise or intelligible principle upon which to determine it. Were I to follow the strict rule of English law embodied in the maxim "*Omne majus continet in se minus*," the case would be free from complication, and an application to it of the doctrine of merger, that "whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be merged, that is, sunk or drowned, in the greater," would conclude the matter. For merger applies by mere operation of law independently of any intention of the parties and without any express or implied

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1881 agreement between them that the inferior remedy should be extinguished.—*Price v. Moulton* (1). Consequently in the present case, if it can be said that the defendants, by accepting the properties mortgaged to them as part payment of their respective mortgage-debts, have acquired the legal estate of proprietors in place of the equitable interest of mortgagees, the strict application of the before-mentioned principle would easily settle the question. Even where a mortgagee confines himself to purchasing the equity of redemption he takes the conveyance with all intermediate incumbrances of which he has notice.—*Dart's Vendors and Purchasers*, 5th ed., vol. 2, p. 918. It would not, however, in my judgment, be convenient or politic in administering the law in this country between parties to mortgages to adopt and follow these principles of merger in their strictness and entirety. It seems more consistent with the equitable doctrine recognized in our Courts to accept as a guide the proposition enunciated in *Story's Equity Jurisprudence*, 11th ed., s. 1035c., that the question as to whether a mortgagee, who has become a purchaser of his security, thereby extinguishes his security, may be controlled by the express or implied intention of the parties, and when it is manifestly for the interest of the person in whom both the legal and equitable titles unite to keep the incumbrance alive, Courts of Equity will imply an intention to keep it alive, unless "the other circumstances of the case repel such a presumption. It would therefore seem that in the present case the first step towards arriving at the proper basis upon which to discuss the matter is to ascertain the precise nature of the transactions that took place between defendant No. 1 and defendants Nos. 3 and 4 on the 27th May 1873 and the 5th December 1876, respectively. With regard to defendant No. 3 the transfer to him of the shops in Motiganj was made in discharge of the mortgage-amount secured by the deed of the 1st January 1866, together with another debt of Rs. 4,500 due from defendant No. 1. As to defendant No. 4, he was the holder of a decree obtained in the suit brought by him on his mortgage for Rs. 3,452, which included Rs. 2,000 the principal sum advanced with interest to date and costs. The conveyance to him of the Rani Mandui house, the value of which was taken at Rs. 1,950, was

(1) 10 C. B., 880.

a payment to that extent on account of the judgment-debt, and the new bond that was taken secured the balance of Rs. 1,500. Looking at these circumstances, can it be said that the defendants Nos. 3 and 4, at the time they became purchasers of the properties pledged to them, intended to surrender their securities and to adopt the position of their mortgagor with its liability to satisfy charges upon the properties created by him subsequently to their own? For it must be borne in mind that this is not a suit by the second mortgagees to redeem a prior incumbrance, so as to make his own security a first charge, but a specific claim on the basis of his second mortgage to fix the liability to discharge it on defendants Nos. 3 and 4 by sale of the properties purchased by them from the mortgagor. Nor do the plaintiffs in any way propose to make provision for the discharge of the mortgage-debts originally incurred to defendants Nos. 3 and 4. On the contrary, they treat them as satisfied and the securities given for them as being dead, in fact they assert the right of first mortgagees, though upon what precise principle of equity they claim to have their position thus bettered is not altogether clear. It seems to me only reasonable to presume that defendants Nos. 3 and 4, knowing as they did of the subsequent charges to plaintiffs, and the preservation of their mortgages being manifestly to their interest, must at the time of the execution of the several sale-deeds have intended to keep their original securities alive. Necessarily they could effectuate no contract behind the back of the second mortgagees that could defeat their lien, which to this moment is in full force and effect; and were the plaintiffs in the present case asking to redeem the mortgages of defendants Nos. 3 and 4, it is not very easy to see what defence could be made to such a claim. But this is not the relief sought, and having regard to the frame of the suit I agree with my honorable colleague Mr. Justice Oldfield that defendants Nos. 3 and 4 are entitled to resist the sale prayed by the plaintiffs. I, therefore, concur with him in the conclusions he has arrived at upon the first, and indeed the only question upon which he differed with Mr. Justice Pearson, and I hold that as to defendants Nos. 3 and 4 the suit should be dismissed. With regard to the second point, entertaining the view I do upon the first it becomes unnecessary to discuss it, though I may add

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that I am clearly of opinion that the law in regard to it as laid down by the Subordinate Judge and recapitulated by Mr. Justice Oldfield is correct.

Decree modified.

Before Mr. Justice Oldfield and Mr. Justice Straight.

GUMANI (PLAINTIFF) v. HARDWAR PANDEY AND OTHERS
(DEFENDANTS).*

Attachment of Immoveable property—Material misdescription—Private alienation after attachment—Act X of 1877 (Civil Procedure Code), ss. 237, 274, 276.

Application was made for the attachment in execution of a decree of a muafi holding belonging to the judgment-debtor. The numbers and areas given in such application as the numbers and areas of the lands comprised in such holding were the numbers and areas of certain revenue-paying lands, and were not the numbers and areas of any lands held as muafi by the judgment-debtor. The order of attachment described the property as described in the application for attachment. The judgment-debtor having alienated by sale a muafi holding belonging to him, the decree-holders sued to have such alienation set aside as void under the provisions of s. 276 of Act X of 1877. *Held* that, having regard to the description given in the application for attachment and the order of attachment, it could not be said that the muafi holding alienated by the judgment-debtor was under attachment at the time of the alienation, and its alienation was therefore not void under s. 276 of Act X of 1877. *Held* also that the material misdescription of the property in this case in the order of attachment protected the alienees who were *bona fide* purchasers, from having the alienation set aside as void under s. 276, as the attachment could not under the circumstances be held to have been "duly intimated and made known" as required by that section.

THE plaintiff in this suit claimed possession of certain lands by virtue of a conveyance dated the 6th September, 1878. The principal defendants in the suit were the holders of a decree against the vendors of such lands to the plaintiff. Such defendants alleged in defence of the suit that, at the time of the conveyance of such lands to the plaintiffs, such lands were under attachment in execution of their decree against the vendors to the plaintiff, and that in consequence, under the provisions of s. 276 of Act X of 1877,

* Second Appeal No. 1006 of 1880, from a decree of Maulvi Mahmud Bakhsh Additional Subordinate Judge of Ghāzipur, dated the 6th August, 1880, affirming a decree of Munshi Manmohan Lal, Munsif of Ballia, dated the 28th May, 1880.

the conveyance to the plaintiff was void. The plaintiff denied that such lands were under attachment in execution of the decree of the defendants at the time of such conveyance. Both the lower Courts dismissed the suit, holding, with reference to the attachment proceedings, that such lands were under attachment when conveyed to the plaintiff, and such conveyance was consequently void under the provisions of s. 276 of Act X of 1877.

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On second appeal the plaintiff contended that, on the proper construction of the attachment proceedings, such lands were not under attachment at the time of their conveyance to him, and such conveyance was therefore not affected by the provisions of s. 276 of Act X of 1877.

Mr. Conlan and Lala Latta Prasad for the appellant.

Munshi Hanuman Prasad, Pandit Ajudhia Nath, and Mr. Simeon for the respondents.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

OLDFIELD, J.—The plaintiff has bought from certain judgment-debtors of the answering defendants-respondents before us 3 bighas 15 biswas of muafi or revenue-free land bearing in the revenue registers the No. 28. The question is whether the sale is void under s. 276, Civil Procedure Code, by reason of the land having been attached by the respondents at the time of sale in execution of their decree. We find by a reference to the application for attachment that the respondents applied for attachment of their judgment-debtors' interests in a muafi holding, and they appended a list of the property in which it was described as a muafi holding, formerly recorded in the name of Bechu Chaubey, and afterwards of his own son, Shankar, from whom it was bought by Ganga Bishan and Radha Pandey, and at the time in possession of the judgment-debtor, the sister of Radha Pandey, and the holding is stated to have measured at the settlement of 1237, 3 bighas 4 biswas, and at the present time 6 bighas 12 biswas 13 dhurs, and

1881 the details of the said 6 bighas 12 biswas 13 dhurs are given at the foot of the paper, thus:—

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	No.					
	4	1	5	16
	Corner	0	12	4
	No. 19	0	16	0
	„ 27	1	9½	0
	„ 136	2	10	0-Public road.
	Total	6	12	13

Deduct 2 bighas 12 biswas and 13 dhurs in Shankar Chaubey's possession, balance 4 bighas of land of which the judgment-debtor's share is stated to be 2 bighas.

The attachment was made by an order under s. 274, Civil Procedure Code, describing the property in the terms of the above application. It appears, however, that the lands with numbers and area above given are not a muafi holding, but are in fact revenue paying lands, and do not correspond either in numbers or area with any muafi holding of the judgment-debtor, and it is contended that the plaintiff, who bought a particular muafi holding No. 28, comprising 3 bighas 15 biswas, cannot be held to have bought any land under attachment, or be liable to have his purchase set aside under s. 276, Civil Procedure Code. The contention is in our opinion valid. In order to ascertain what was attached in fact, we have to look at the order made under s. 274. The description of the property given in that order is the same as the respondents gave in their application under the requirements of s. 237, which directs that a description of the property sufficient to identify it be given at the foot of the application. It is, however, impossible to say with regard to this description that the particular land bought by the plaintiff was attached; for, though referring to a muafi holding, the particular land pointed out is of another description, and if we look at that part of the description which gives numbers and area, and for purposes of identification this is the most important part, it in no way applies to the land plaintiff bought, but on the contrary it refers to quite a different property. It may have been the intention of the respondent to attach the muafi holding, and the reference to numbers and area may have been an error, but it is equally open to contend that he intended to attach the revenue paying land, and his error was in calling

it muafi land. At any rate it is impossible to hold that the land No. 28, comprising 3 bighas 15 biswas, bought by plaintiff was attached under the order. Besides the very material misdescription of the land as applied to the land plaintiff bought, entered in the order of attachment, will protect a *bona fide* purchaser like the plaintiff from having his purchase set aside under s. 276, as the attachment cannot under the circumstances be held to have been "duly intimated and made known" as required by the section. We decree the appeal and set aside the decrees of the lower Courts, and decree the claim with costs.

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Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

RAM DIAL (PLAINTIFF) v. MAHTAB SINGH AND OTHERS

(DEFENDANTS).*

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April 26.

Sale in execution—Order of attachment and sale-notifications not signed by Judge but by Munsarim—Sale set aside—Suit to have sale confirmed—Act VIII of 1859 (Civil Procedure Code), ss. 222, 256, 257—Equitable estoppel.

On the 21st August, 1876, certain immoveable property belonging to *M* was put up for sale and was purchased by *R*. On the 20th April, 1877, such sale was set aside under s. 256 of Act VIII of 1859, on the ground that the order attaching such property and the notifications of sale had not, as required by s. 222, been signed by the Court executing the decree but by the Munsarim of the Court. On the 27th June, 1877, *M* conveyed such property to *H*, who purchased it *bona fide*, and for value, and satisfied the incumbrances existing thereon. On the 15th April, 1878, *R* sued *H* and *M* to have the order setting aside such sale set aside, and to have such sale confirmed in his favour, on the ground that it had been improperly set aside under s. 256 of Act VIII of 1859, the judgment-debtor not having been prejudiced by the irregularities in respect whereof such sale had been set aside. *Held* by OLDFIELD, J., that, although such sale might have been improperly set aside, yet inasmuch as the order of attachment and the notifications of sale could have no legal effect, having been signed by the Munsarim of the Court executing the decree, and not by the Court, as required by s. 222 of Act VIII of 1859, and inasmuch as it would be inequitable, after the incumbrances on such property had been satisfied and the state of things changed, to allow *R*, after standing by for a year, and permitting dealings with the property, to come in and take advantage of the change of circumstances and obtain a property become much more valuable at the price he originally offered, *R* ought not to obtain the relief which he sought.

* First Appeal, No. 113 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 30th June, 1879.

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Held by STRAIGHT, J., that the fact that the Court executing the decree had not signed the order of attachment and the notifications of sale vitiated the proceedings in execution *ab initio*, and rendered the sale which *R* desired to have confirmed void, and *R*'s suit therefore failed, and had properly been dismissed.

CERTAIN immoveable property was put up for sale on the 21st August, 1876, in execution of a decree held by one Jag Ram against one Mahtab Singh, and was purchased by the plaintiff in this suit for Rs. 1,725. Mahtab Singh objected to the sale; and on the 20th April, 1877, the Court executing the decree set the sale aside on the ground that the order of attachment and the notifications of sale had not been signed by the Court itself but by the Munsarim of the Court. On the 27th June, 1877, Mahtab Singh conveyed the property to the defendants in this suit for a consideration of Rs. 29,000. The purchase-money consisted of the following items, namely, a set-off of Rs. 5,182 due on a decree, and of Rs. 10,418 due on a mortgage, by the vendor to the defendants; a set-off of Rs. 8,000, the purchase-money of certain property purchased by the vendor from the defendants; Rs. 1,000 left with the defendants, to be paid in satisfaction of a decree held by one Munna Lal against the vendor; and Rs. 4,400 left with the defendants to be paid in satisfaction of two decrees held by Jag Ram against the vendor. On the 15th April, 1878, the plaintiff instituted the present suit against the defendants to have the order setting aside the sale set aside, and to have the sale confirmed in his favour. The defence set up by the defendants, the grounds on which the Court of first instance dismissed the suit, and on which the plaintiff appealed to the High Court, are fully stated in the judgment of Oldfield, J.

Pandit *Ajudhia Nath* and *Lala Harkishen Das* for the appellant.

Mr. Howell, *Munshi Hanuman Prasad*, and *Babu Jogindro Nath Chaudri* for the respondents.

The following judgments were delivered by the High Court:—

OLDFIELD, J.—The plaintiff bid for the property in suit at an auction-sale in execution of a decree against Mahtab Singh, and it

was knocked down to him on the 21st August, 1876, for Rs. 1,725. Mahtab Singh urged objections to the sale, one objection being that the sale was void by reason of irregularity in the warrant for attachment and notices of sale, inasmuch as they bore the signature of the Munsarim or Clerk of the Court, and not of the Judge, and the Judge allowed the objection and set aside the sale on the 30th April, 1877. The plaintiff instituted this suit on the 15th April, 1878, to have the Judge's order set aside and his right declared to have the sale confirmed in his favour, on the ground that the Judge failed to determine if the judgment-debtor had sustained any material injury from the irregularity complained of and alleging that he had not suffered thereby. Since the date the sale was set aside Hira Lal and others have purchased the property from Mahtab Singh, and discharged the liabilities due on it, and they are the principal defendants in the case, and pleaded, *inter alia*, that the suit is not maintainable, having regard to the provisions of s. 257, Act VIII of 1859, as the order setting aside the sale was final, and that the irregularity complained of afforded a valid ground for setting aside the sale, and they pleaded that the plaintiff could not succeed against them, the purchasers from the judgment-debtor. The Subordinate Judge has held that the Judge in setting aside the sale was acting within his jurisdiction under the provisions of s. 256, Act VIII of 1859; that he dealt with the objections as coming within the scope of the section and as establishing material irregularity and substantial injury to the judgment-debtor; and his order being made in the exercise of the powers vested in him by s. 256, a regular suit cannot be instituted, the order setting aside the sale being final. He further held that the sale had been properly set aside on the facts shown, and that it would be a hard injustice to the answering defendants to allow the claim, as they are *bona fide* purchasers from Mahtab Singh, and have discharged his liabilities, and it would not be equitable to allow the plaintiff to come in, after standing by so long since the sale was set aside, and obtain the property now free from liabilities, at the price he bid for it when incumbered, and he dismissed the suit. The plaintiff has appealed. The decision of the majority of this Court in *Dewan Singh v. Bharat Singh* (1) has been pressed upon us as

(1) I. L. R., 3 All., 206.

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an authority for holding that the present suit is not barred by the terms of s. 257, Act VIII of 1859. I myself dissented from the view taken by the majority of the Court in that case, but I feel myself bound to accept the ruling so far as it is applicable to the case before us. Assuming, however, that it is an authority for holding that the present suit is maintainable, and we are at liberty to determine if the Judge's order setting aside the sale was properly made or not, and if not to set it aside and declare plaintiff's right to have the sale confirmed to him, I am not disposed to do so with reference to some of the grounds on which the Subordinate Judge proceeds. The fact that the order of attachment and notices of sale were not issued under the signature of the Judge but of the Munsarim as though emanating from him, constituted serious irregularities of procedure. Orders so issued could, properly speaking, have no legal effect, since s. 222, Act VIII of 1859, requires that the warrants for execution shall be signed by the Judge; the Munsarim had no power to sign them, having regard to his duties as declared in s. 24 of Act VI of 1871 (Bengal Civil Courts Act), and the orders of the Court made in pursuance of the provisions of s. 24.—(Circular Order No. 9, dated the 19th August, 1870.) Moreover the sale could not now be confirmed in plaintiff's favour without serious injustice to the respondents who have purchased the property from Mahtab Singh, *bonâ fide*, and for value, and to whom at the time of the sale Mahtab Singh was able to confer a good title, since the sale at which plaintiff bid could not become absolute without confirmation. Since the date of the auction-sale also the liabilities on the property have been satisfied, and the state of things has materially changed, and it would be inequitable to allow plaintiff, after standing by for a year, and permitting dealings to be made with the property, to come in and take advantage of the change of circumstances and obtain a property become much more valuable at the price he originally offered. I refuse therefore to give a declaration of his right to have the sale confirmed to him, and I would dismiss the appeal with costs.

STRAIGHT, J.—I concur with my honorable colleague that the plaintiff's claim should be disallowed and this appeal dismissed. I am of opinion that the sale in execution at which the plaintiff

bought was wholly void, and that the absence of the signature of the Judge from the warrant of attachment vitiated the proceedings in execution *ab initio*. The language of s. 222, Act VIII of 1859, is plain and positive, and it seems to me impossible to hold that the order directing attachment is not a warrant within the meaning of that section. Whether it was directed to the Nazir or other person to seize the moveable property of a judgment-debtor, or to the judgment-debtor himself prohibiting him from alienating his immoveable property, it was an order essentially in the nature of a warrant, and as such required the Judge's signature under the old law. It was contended for the appellant at the hearing that this objection was not taken by the judgment-debtor in the grounds upon which he asked for cancelment of the sale, and the Judge had no right to entertain it by his own motion. I am by no means sure that this plea has any foundation in fact, for I find the Judge remarks in his judgment that "the first contention on the appellant's part is that no sale properly so called took place, that is, that all proceedings were vitiated *ab initio* by the irregularity of the warrant of execution, which ought not only to bear the seal of the Court, but also shall be signed by the Judge." Even if this point had not been started by the judgment-debtor, I think it would have been competent for the Judge himself to take notice of it, going as it does to the very root of the proceedings. But under any circumstances, we in a suit like the present, which practically invites us to confirm a sale by declaring the plaintiff's right to have it confirmed, are in my opinion not only entitled but bound to closely scrutinize all the proceedings in execution to ascertain whether such sale was a valid and binding one. This I have already said it was not, and the foundation of the plaintiff's claim therefore falls away. I say nothing as to his conduct in holding back until almost the very last moment from instituting his suit, though I am glad to think that, from the point of view from which I regard the case, the subsequent innocent purchasers from the judgment-debtor will obtain the property, they have not only bought and paid for, but the incumbrances upon which they have discharged.

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SINGH.*Appeal dismissed.*

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April 21.

Before Mr. Justice Spankie and Mr. Justice Straight.

BADRI PRASAD (PLAINTIFF) v. DAULAT RAM (DEFENDANT).*

*Mortgage—Agreement to convey the mortgaged property in case of default—
Suit for specific performance of contract—First and Second mortgages—
Act I of 1877 (Specific Relief Act), s. 27 (b).*

On the 7th February, 1873, *F* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August, 1877, he mortgaged such estate to *P*, agreeing that, if he failed to pay the mortgage money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." On the 6th October, 1877, *F* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February, 1873, was extinguished. In December, 1877, *B* and *D* obtained a decree against *F* on the mortgage of the 6th October, 1877, and in June 1878, in execution of that decree, such estate was put up for sale and was purchased by *D*. In February, 1880, *P* sued *F* and *D* for the execution of a conveyance of such estate to him in accordance with *F*'s agreement of the 7th August, 1877.

Held that the mortgage of the 7th August, 1877, was not in the nature of a mortgage by conditional sale and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also, that, assuming that *D* had no notice of the agreement of the 7th August, 1877, it was very doubtful whether under s. 27 (b) of Act I of 1877 *D* could claim that specific performance of that agreement should not be granted, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Pandit Ajudhia Nath for the appellant.

Pandit Bishambar Nath and Babu Oprokash Chander Mukerji for the respondent.

The judgment of the Court (SPANKIE J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is a suit for specific performance of a contract, as also for the possession of certain immoveable property. The following are the circumstances of the case. Faiz Bakhsh Khan, defendant, was the owner of zamindari shares in Muhammad

* First Appeal, No. 71 of 1880, from a decree of Bai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 13th March, 1880.

pur Kalan and mauza Ganaura Shaikh, zila Bulandshahr. Some-time prior to February, 1873, he mortgaged his share in Ganaura Shaikh to one Ghulam Husain for an advance of Rs. 300. On the 7th February, 1873, having obtained a loan from Balkishan deceased, represented in this suit by his sons, and Ganga Ram of Rs. 400, Faiz Bakhsh Khan pledged and hypothecated, as security for the same, his equity of redemption in the share already mortgaged to Ghulam Husain. Interest was to be paid on the Rs. 400 at the rate of Re. 1-12-0 per cent. per mensem, at the end of every six months, and in case of default of a "single day," it was to be increased to Rs. 2 per cent. per mensem from the date of the execution of the bond. On the 7th August, 1877, in consideration of Rs. 8,400, cash actually advanced to him, or paid on his behalf, Faiz Bakhsh Khan made another instrument in favour of Badri Prasad, plaintiff in the present suit, and his now deceased brother Ram Prasad, bankers of Bulandshahr, which after providing, among other matters, that the amount was to be repaid within two years, with interest at Re. 1-4-0 per cent. per mensem, went on to say:—"I pledge and hypothecate my $7\frac{1}{4}$ biswa zamindari share in mauza Muhammadpur: also one biswa, two biswansis, four nanwansis, nine tanwansis zamindari share in mauza Ganaura Shaikh; I shall not transfer them anywhere: should I do so, the same will be null and void: if I fail to pay the said sum within the above term, I shall make a sale of the said shares, and if I do not effect the sale thereof and bring any objections, then the creditors shall be competent on the basis of this contract to bring a claim to get a sale effected and a deed of absolute sale executed." This instrument was duly registered at Bulandshahr on the 7th August, 1877. On the 6th October, 1877, Faiz Bakhsh Khan executed a bond to Balkishan deceased and his son Daulat Ram, defendant No. 2, for Rs. 1,200, the details of the payment of which amount is entered at the foot of the document to the following effect. The sum of Rs. 848 was taken to be the total amount of principal and interest due to date upon the bond of 7th February 1873, from Faiz Bakhsh Khan to Balkishan and Ganga Ram. Of this Rs. 424 was to be considered as having been paid to Balkishan and Rs. 424 was left in his hands to discharge Ganga Ram his co-obligee. The remaining Rs. 352 was taken in cash by the obligor. The security given was

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1881 <hr/> BADRI PRA. SAD v. DAULAT RAM.	as follows :—" I pledge and hypothecate in this bond a one biswa 2½ biswansi zamindari share in the 12½ biswa thoke of mauza Ganaura Shaikh, which shall remain hypothecated until payment of this sum : I shall not hypothecate it to any one else : I shall pay the interest of Re. 1-8-0 per cent. per mensem at the end of every year : should I fail to pay the interest at the end of any year, I shall pay interest on that interest also at the same rate of Re. 1-8-0."
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On the 20th December, 1877, Balkishan and Daulat Ram obtained a decree against Faiz Bakhsh Khan upon his bond of 6th October, 1877, and in execution on the 20th June, 1878, brought to sale his share in mauza Ganaura Shaikh, Daulat Ram one of the decree-holders himself purchasing it. The present suit was instituted on the 2nd of February, 1880, after demand made upon Faiz Bakhsh Khan to execute a sale-deed in accordance with the terms of the contract of 7th August, 1877, and refusal by him to do so. The Subordinate Judge decreed the plaintiff's claim in so far as it related to Muhammadpur, but he dismissed it as regards mauza Ganaura Shaikh. The appeal before us, in which the plaintiff is the appellant, solely relates to this last mentioned property, and the pleas taken are in substance that, when the new bond of 6th October, 1877, was executed, the old contract of 7th February, 1873, came to an end, and that under the bond of 6th October, 1877, the defendant Daulat Ram and his deceased father Balkishan could have no lien on mauza Ganaura Shaikh in face of the plaintiff's security thereon of the preceding month of August. On the part of Daulat Ram, respondent, it is urged that the grant of specific relief being entirely a matter of discretion for the Court, it should not be given against a "*bond fide*" purchaser for value without notice; that the lien on mauza Ganaura Shaikh created by the bond of 7th February, 1873, was never surrendered when the bond of 6th October, 1877, was executed, but that on the contrary it was kept in force; that the instrument of the 7th August, 1877, being in the nature of a mortgage by conditional sale, proceedings should have been taken for foreclosure.

We are of opinion that this appeal should prevail and that the plaintiff-appellant is entitled to have a conveyance executed to him of the share of Faiz Bakhsh Khan in mauza Ganaura Shaikh.

The instrument of August, 1877, was not a conditional sale-deed. On the contrary it hypothecated that share for the two years for which the loan was made, and specifically provided that, if there was default in repayment of Rs. 8,400 by the appointed date, the obligees might call upon the obligor to execute a legal transfer of the property pledged. The terms of the latter part of the instrument of August 1877, would in our judgment of themselves have precluded proceedings for foreclosure, and we see no reason to regard them as amounting to more than an ordinary contract to do a particular act at a time designated, of which specific performance may be enforced by the promisee. The present suit has been properly brought, and the respondent, Daulat Ram, being the purchaser and in possession of a portion of the property hypothecated to the plaintiff and included in the deed of August, 1877, has been rightly made a defendant. The contention of the pleader for Daulat Ram that the lien created by the bond of February, 1873, was subsisting at the time of the sale in execution in June, 1878, is altogether untenable. It seems clear to us from the terms of the bond of October, 1877, and the mode in which the money advanced under it was disposed of, that the bond of February, 1873, was regarded as defunct and at an end, and that an entirely fresh transaction, with a new obligee in the person of Daulat Ram, instead of Ganga Ram, was entered into. Moreover it was assumed at the hearing that the bond of February, 1873, mortgaged the share of Faiz Bakhsh Khan in mauza Ganaur Shaikh, but that is incorrect. It was his equity to redeem Ghulam Husain's charge that was pledged, whereas by the bond of October, 1877, better security was obtained in the hypothecation of the share itself. Besides, the crediting of Balkishan with the Rs. 424 and the leaving a corresponding sum in his hands to satisfy the claim of his co-obligee Ganga Ram goes a long way towards establishing that the bond of February, 1873, was discharged and put an end to when the new relations were created by that of October, 1877. Under all the circumstances we find it impossible to hold that, at the time of purchase of mauza Ganaura Shaikh by Daulat Ram, Balkishan's lien under the bond of February, 1873, was still subsisting. The only point urged for the respondent at all deserving consideration is, that he should be treated as coming within the exception contained in sub-section (b) of s. 27

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of the Specific Relief Act. The argument is a specious one and at first sight would appear to have some force, for it seems only equitable that specific performance of a contract should not be enforced where property would be affected that had passed into the hands of "a transferee for value, who has paid his money in good faith and without notice of the original contract." But if the question of notice could enter into our consideration in the present case which it properly cannot, the implication of notice is irresistible. The instrument of August, 1877, and the bond of October, 1877, were executed within two months of one another and registered in the Bulandshahr registry; and it passes belief that, being fully alive to the purposes and objects of the registration law, the obligees of the bond should have made no inquiries at the office to ascertain whether there were any prior charges on their security. But apart from this we entertain very grave doubts whether the exception of sub-section (b) of s. 27 of the Specific Relief Act could have any application to the circumstances of this case, where the contest lies between a prior and subsequent lien created upon the same property which has passed to the transferee under a sale in execution of a decree for enforcement of the subsequent lien.

The appeal is decreed with costs, and we declare the plaintiff appellent entitled to a decree in full for the relief sought by him in his petition of plaint.

Appeal allowed.

CIVIL JURISDICTION.

1881
 April 22.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIMALAYA BANK (PLAINTIFF) v. HURST AND ANOTHER (DEFENDANTS).

Sale in execution of Small Cause Court decree—Rateable division of sale-proceeds—Holder of decree made by Judge of Small Cause Court in the exercise of the powers of a Subordinate Judge—Act X of 1877 (Civil Procedure Code), s. 295.

The Judge of a Court of Small Causes sitting in the exercise of his powers as such and in the exercise of his powers as a Subordinate Judge is not one and the same Court but two different Courts.

Held therefore, that the holder of a decree made by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby

entitled to share rateably, under s. 295 of Act X of 1877, in assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court.

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THIS was a reference to the High Court by Mr. F. H. Fisher, Judge of the Court of Small Causes at Dehra Dún. The facts which gave rise to this reference are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. *Ross* and *Hill* for the Himalaya Bank.

The judgment of the High Court (STRAIGHT, J., and OLDFIELD, J.) was delivered by

STRAIGHT, J.—This is a reference by the Small Cause Court Judge of Dehra Dún under s. 617 of the Civil Procedure Code. The following are the circumstances that have led to its being made. On the 23rd May, 1879, a decree was passed by the Small Cause Court in favour of the Himalaya Bank against Joseph Hurst and B. J. White for the sum of Rs. 448-4-6. Prior to this date a Mrs. Hammond had obtained a decree against Joseph Hurst in the year 1877 for Rs. 6,961-6-5, and in 1879 one George Hunter had also obtained a decree for Rs. 2,308-7-4, against Hurst. It must be noted that the Small Cause Court Judge of Dehra is vested with extraordinary powers as a Subordinate Judge, and the two decrees of Hammond and Hunter were both passed by him in his character of Subordinate Judge. Subsequently to their decrees applications were made to the Subordinate Judge by Hammond and Hunter for execution. The Himalaya Bank also applied to the Small Cause Court for execution of its decree, and ultimately a sale was held under that decree on the 10th November, 1880, by which Rs. 641-2-0 were realized, and this sum is now held in deposit by the Small Cause Court. After this sale Hammond and Hunter applied under s. 295 of the Civil Procedure Code to the Small Cause Court to be allowed to participate rateably in the proceeds. The substantial point now referred to us is, whether, having regard to the circumstance that they are decree-holders of the Subordinate Judge's Court, it is competent to them to share in the assets realized from the sale in execution of the Small Cause Court decree in favour of the Bank. It may incidentally be observed that in 1878, when Mrs. Hammond had already obtained her

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decree, Hurst presented a petition to be declared an insolvent, and the amount of her judgment-debt was scheduled in the list of creditors. Ultimately an order was passed declaring Hurst an insolvent, and it would therefore seem that her judgment-debt under s. 351 of the Civil Procedure Code became a decree of the Court of the District Judge. This, however, is not important in view of the construction we feel ourselves constrained to place upon s. 295 of the Code. In our opinion, the Small Cause Court Judge in his more limited jurisdiction on the one hand, and in his larger jurisdiction of Subordinate Judge on the other, fills two distinctly different judicial characters. The sale in execution of the decree of the Bank was directed by him as Judge of the Small Cause Court. The applications made to him by Mrs. Hammond and Mr. Hunter for execution of their decrees were in his character of Subordinate Judge. It is obvious, therefore, that the terms of s. 295 had not been satisfied. The assets have been realized by sale by the Small Cause Court. Prior to their realization Mrs. Hammond and Hunter had not applied to the Court that afterwards received such assets for execution of decrees for money against Hurst; but on the contrary their applications for execution were to the Subordinate Judge's Court. They were not therefore entitled to come in and ask the Small Cause Court Judge to allow them to share in the proceeds acquired by the sale in execution of that Court's decree, on the strength of the two decrees of the Subordinate Judge's Court. This being the view we entertain, the reference must be answered accordingly.

APPELLATE CIVIL.

1881
April 30.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KISHEN LAL AND OTHERS (PLAINTIFFS) v. KINLOCK (DEFENDANT).*

Vendor and Purchaser—Agreement by purchaser to refund purchase-money in case land sold proved deficient in quantity—Suit for refund—Suit for compensation for breach of contract—Act XV of 1877 (Limitation Act), sch. ii, No. 65.

The vendor of certain land agreed in the conveyance, which was registered, that, in case the land actually conveyed proved to be less than that purporting to

* Second Appeal, No. 768 of 1880, from a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 23rd April, 1880, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 16th December, 1879.

be conveyed, he should make a refund to the purchaser of the purchase-money in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. *Held* by SPANKIE, J., that the suit was one of the nature described in No. 65, sch. ii of Act XV of 1877, to which, the agreement being in writing registered, the limitation provided by No. 116, sch. ii of that Act was applicable. *Held* by OLDFIELD, J., that No. 116, sch. ii of Act XV of 1877, was applicable to the suit.

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On the 8th June 1873, the defendant in this suit, Kinlock, conveyed to one Kanhaiya Lal and one Hardai Kuar 352 bighas 13 biswas of land situate in a village called Shampur in consideration of Rs. 7,300. The conveyance, after reciting that the purchase-money had been calculated on a rental of Rs. 827-12-0, stated (1) that, in case the vendees found, when making collections, that the rent-roll did not yield that amount, the vendor should refund to the vendees a sum of money proportionate to the deficiency; (ii) that, should there be found any deficiency in the quantity of land sold, the vendor should hold himself responsible for the value of the deficiency, costs of litigation, and interest at twelve per cent; and (iii) that, in case the vendor failed to fulfil these conditions, the vendees should be at liberty to realize their purchase-money in respect of the quantity of land deficient and any deficiency in the rent-roll by a suit against the vendor. On the 22nd April 1877, Kanhaiya Lal and Hardai Kuar conveyed the property which they had purchased from the defendant and all their rights as against him to Jiwa Ram, the father of the plaintiffs in this suit. On the 7th June 1879, the plaintiffs brought the present suit against the defendant. In this suit, alleging, *inter alia*, that the quantity of land conveyed by the defendant to Kanhaiya Lal and Hardai Kuar had been found to be, not 352 bighas 13 biswas, but 288 bighas 6 biswas and 10 biswansis, and that the rental amounted, not to Rs. 827-12-0, but to Rs. 733-8-0, they claimed from the defendant, under his conveyance to their vendors of the 8th June 1873, *inter alia*, the value of the deficiency in the quantity of land. The defendant contended, *inter alia*, that the original vendees of the land became aware of the deficiency in the quantity of land in 1281 Fasli (Sept. 1873—Sept. 1874) and did not claim any thing

1881 on account of the same, and the suit was barred by limitation. The
KISHEN LAL Court of first instance held that the suit was within time, and finding
 v. that there was a deficiency in the quantity of land of 33 bighas
KINLOCK. 16 biswas and 10 biswansis, gave the plaintiffs a decree in respect
 of such deficiency. The lower appellate Court held on appeal by
 the defendant that the suit was barred by limitation under No. 96
 sch. ii of Act XV of 1877.

On second appeal by the plaintiffs it was contended on their behalf that No. 96, sch. ii. of Act XV of 1877, was not applicable to the suit, but No. 120.

Munshi *Sukh Ram* and Babu *Jogindro Nath Chaudhri* for the appellants.

Messrs. *Conlan and Ross* for the respondent.

The following judgments were delivered by the Court:—

SPANKE, J.—(After stating the facts of the case, the decisions of the lower Courts, and the grounds of appeal, continued):—The first plea must be allowed. The suit cannot be regarded as one for relief on the ground of mistake, nor has there been any misrepresentation within the meaning of any one of the clauses of s. 18 of the Indian Contract Act of 1872. The three contingencies set forth in the contract of sale were foreseen or anticipated by both parties, and with regard to two of them, deficiency of rental and deficiency in the quantity of land, provision was made for a refund or abatement of the purchase-money in proportion to the loss that might be discovered. There is no question here of voiding a contract at the option of one of the parties on the ground that his consent was obtained by misrepresentation, nor is there any demand on the part of a party whose consent was caused by misrepresentation that a contract shall be performed, and that he shall be put in the position in which he would have been if the representations had been true. Nor is it the case of a party who finds that his vendor had not the entirety of the estate which he professes to sell, and who refuses to accept at a proportionate abatement the quantity of land which the vendor really owns and has to sell. Nor again is the plaintiff here, after discovery of the deficiency in the quantity of land

sold, exercising any election and offering to take his vendor's interest in the estate, subject to a proportionate reduction in the amount of sale-consideration. But the parties have provided for a deficiency either suspected or known to both of them to be likely to happen, and it is one of the conditions of the sale-contract that, if it ever happened, there will be a refund of a proportionate amount of the purchase-money. There is no pretence of any consent to the contract of sale induced by misrepresentation. In their plaint they sue to recover the money claimed by enforcing the conditions of the contract, and in their third ground of appeal they take exception to the Judge's ruling that they are asking for relief on the ground of mistake, and again assert that they seek to enforce the condition of the contract. But if the plaintiffs are not seeking relief on the ground of mistake, what are they asking for, and what is the limitation applicable to the suit? According to the statement of plaintiffs themselves they claim to enforce the conditions of the contract of sale of 1873, by virtue of the sale to them in 1877 by the original vendees of the estates covered by that deed, and by the assignment of the rights of all kinds secured by the instrument. Their cause of action is the right to sue for the money claimed in consequence of defendant's refusal to carry out his part of the contract. The refund of the purchase-money on the happening of the contingencies provided for in the deed of sale must be regarded as compensation for the deficiency. The sale to the purchaser is maintained, but when it appears that there is a deficiency in rental or quantity of land sold, he is entitled to satisfaction and an equivalent for the deficiency. The terms of the deed may call it a refund of purchase-money, or a proportionate reduction in the amount, or an abatement, of the purchase money, but it is in fact compensation: and by the deed itself, if there prove to be a deficiency in the quantity of land, not only is a proportionate amount of the purchase-money, *i.e.*, the value of the land deficient, to be paid to the vendees, but they are to have any costs of Court and interest at 12 per cent. It would seem then that the claim here is one brought into Court because the defendant refuses to fulfil the conditions of the contract and to make good to the plaintiffs the loss they have sustained. Had the defendant paid the value of the land that is deficient, or refunded to the purchaser on account of

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purchase-money proportionate to decrease in the rental, there would have been no need of this suit. The plaintiffs are compelled to sue because defendant has broken the promise which is the agreement in the conditions of the sale. Under these circumstances art. 65, sch. ii of Act XV of 1877, appears to be applicable,—“For compensation for breach of a promise to do any thing at a specified time, or upon the happening of a specified contingency.” I had been disposed to regard the suit as one for money paid upon an existing consideration which afterwards fails, but on reflection I think that art. 97 of the schedule would not apply. It is true that the purchaser undertakes to pay Rs. 5,000, for all the lands included in the sale-deed, and for this sum the vendor engages to deliver the land to the vendee, and the latter is unable to put the former into possession of all that he proposes to sell. But still the consideration cannot be said to have failed in regard to the subject matter of the contract itself. The provision made for compensation should there be any deficiency and the maintenance of the contract itself precludes the assumption that there has been a failure of consideration. In this case the vendee could not have repudiated the sale, as he had accepted the promise of the vendor to make good by a money compensation any deficiency as to the quantity of the land sold. When he receives the compensation promised, the consideration has not failed. The vendor retains the purchase-money and the vendee retains the land. The consideration would fail if the deficiency in the rental and quantity was so large that the vendor had nothing at all left to sell. After full consideration it appears to me that art. 65 applies. The agreement is made up of several promises and every promise is in itself an agreement, and with regard to a deficiency in the rental it is provided that, if it is discovered at the time of making collections from the tenants, “then the vendor should refund to the vendee so much out of the purchase-money as would be proportionate to the decrease.” In regard to deficiency in the quantity of land the provision is: —“Should there arise any deficiency or defect in the quantity sold, the vendor shall stand responsible for the same: that in case of there being deficiency in the share sold the vendor shall pay to the vendees the value thereof, with the costs of Court and interest of one per cent.” But if art. 65 applies, the limitation begins to run when the specified time

arrives, or the contingency happens, and the ordinary limitation would be three years. But the promise is recorded in writing registered, and the limitation is extended by art. 116 to six years. This is settled by the Full Bench decision of this Court in the case of *Husain Ali Khan v. Hafiz Ali Khan* (1). This being so, the suit cannot be said to be barred by limitation, and the plaintiffs were entitled to have it tried on the merits, the suit having been instituted within six years of the date of the execution of the original deed of sale, and therefore of the discovery of the deficiency.

OLDFIELD, J.—I concur in holding that art. 116, sch. ii of the Limitation Act is applicable to this suit, and that the suit is not barred by limitation.

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CIVIL JURISDICTION.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BENARSI DAS (PLAINTIFF) v. BHIKHARI DAS (DEFENDANT).*

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April 4.

Promise to pay balance found due on accounts stated in instalments—Promissory Note—Note of agreement in account-book—Evidence of terms of agreement—Act I of 1872 (Evidence Act), s. 91—Relinquishment of part of claim—Act X of 1877 (Civil Procedure Code), s. 43.

In 1876 accounts were stated between *B* and *D*, and a balance of Rs. 800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. *B* at the same time noted in his account-book that such balance was "payable in four instalments of Rs. 200 yearly." In July 1879, *B* sued *D* upon such instrument for the balance of the first instalment. The Court trying this suit refused to receive such instrument in evidence on the ground that it was a promissory note and as such was improperly stamped. Thereupon *B* applied for and obtained permission to withdraw from the suit with liberty to bring a fresh one for the original debt. In October 1879, *B* again sued *D*, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account-book. He obtained a decree in this suit for the amount claimed by him. In 1880 *B* again sued *D*, claiming the amount of the third instalment, again basing his claim upon such note.

Held by SPANKIE, J., that the suit last-mentioned was barred by the provisions of s. 43 of Act X of 1877, inasmuch as *B* should in the second suit

* Application, No. 85B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 23rd August 1880.

(1) I. L. R., 3 All., 600.

1881 brought by him against *D* have claimed the balance of the money found due from *D* to him upon the accounts stated between them, instead of claiming the balance of the instalments due.

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Held by **OLDFIELD, J.**, that such suit was not so barred, the causes of action therein and in the former suit being different.

Held by the Court that the agreement by *D* to pay the balance found due from him to *B* on accounts stated between them in instalments of Rs. 200 annually could not be proved by the note made by *B* in his account-book, but could only be proved by the promissory note.

THIS was an application for the revision under s. 622 of Act X of 1877 of a decree of **R. D. Alexander, Esq.**, Judge of the Court of Small Causes at Allahabad, dated the 23rd August 1880. The facts of the case are sufficiently stated for the purposes of this report in the judgment of **Spankie, J.**

Pandit Ajudhia Nath and **Munshi Ram Prasad** for the applicant, plaintiff.

Mr. Conlan for the defendant.

The Court (**SPANKIE, J.**, and **OLDFIELD, J.**) delivered the following judgments:—

SPANKIE, J.—The plaintiff on the 21st July 1879 sued in the Allahabad Small Cause Court for Rs. 182-4-0, due on a bond as he averred it to be, but which was subsequently held to be a promissory note promising to pay Rs. 800 (which had been found due on an adjustment of accounts between the parties) in four instalments of Rs. 200 a year, with interest at 12 per cent. to be charged in case of default in the payment of any instalment, and to be deducted in the event of any prior payment of any instalment. The Judge, holding the document to be a promissory note, refused to receive it in evidence, as it was not stamped. The plaintiff sought permission, under s. 373 of Act X of 1877, to withdraw the suit with leave to bring a fresh one for the subject matter. The Judge accorded permission to the plaintiff to bring a fresh suit for the original debt. This decision became final. On the 2nd October 1879, the plaintiff sued to recover Rs. 190-8-0, the balance of two instalments due on a balance of account stated by defendant on the 18th October 1876, corresponding with **Katik**

Sudi 1st, Sambat 1933. The books of Prag Das, whom the plaintiff represents, showed that, independently of the promissory note which defendant signed, Prag Das had made a note of the transaction, and the terms of the agreement are also entered in the books as follows:—"Balance Rs. 880 payable in four instalments of Rs. 200 yearly." Whether or not the terms of the agreement could be proved by the note referred to made by Prag Das was not considered by the Judge. He accepted, however, the claim and decreed it in favour of the plaintiff against defendant. But there is no doubt that defendant contended that the suit was not cognizable, as the claim on the promissory note had failed, and that the claim was bad, because there was no proof that any balance was struck, and that the debt of Rs. 800 should have been sued for in the Munsif's Court or a portion of it should be abandoned in order to bring the claim within the jurisdiction of the Small Cause Court. An application for review of judgment was presented to Mr. Knox, who had succeeded Mr. Thomson. But Mr. Knox recorded that it was immaterial to consider whether the errors alleged had been legal errors or otherwise, as he was debarred by s. 624 of Act X of 1877 from reviewing his predecessor's judgment. This was on the 18th November 1879. On the 16th March 1880, on the petition of defendant, Pearson, J., and Straight, J., held that the second suit was one within the jurisdiction of the Small Cause Court. They therefore declined to interfere under s. 622 of Act X of 1877 as amended by Act XII of 1879. Such is the history of the case up to the suit the subject of the present petition to us under s. 622 of the Civil Procedure Code.

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The plaintiff in the present suit seeks to recover the third instalment due under the agreement after adjustment of accounts. The defendant contended that when the former suit was brought the claim should have been for the Rs. 800, and not for a portion of it, as the contract in consequence of the inadmissibility of the promissory note could not be proved, and plaintiff had been allowed to bring a fresh suit for the original debt; as he had omitted to sue for the whole s. 43 of Act X of 1877 barred the suit. The present Judge, Mr. Alexander, holds this contention to be unanswerable: the instalments were fixed under the contract

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reduced to writing and were part and parcel of it: the document could not be received in evidence and so disappears entirely: the plaintiff had to fall back upon the original debt itself, for the payment of which there was no agreement to pay by instalments: s. 43 of the Act clearly barred the claim: the words of ss. 91 and 92, but not the provisos, apply to the suit: the rejected document was not silent as to the instalments, and there was no separate oral agreement specifying any contingency which might occur before the document could operate as it was intended to do: nor was there any subsequent oral agreement as to these instalments, nor if there had been would it have recorded or modified the previous written agreement; it would simply have reiterated it: when the promissory note could not be used, the plaintiff had to prove the fact of the debt due by defendant to him: the conditions of the promissory note as to repayment by instalments and as to interest disappeared, and plaintiff was in the position of a man to whom another owes a sum of money which the law presumes to be payable at once: the Judge therefore dismissed the suit.

It is contended that the Judge acted irregularly in the exercise of his jurisdiction in refusing to admit in evidence the plaintiff's account-book, on which the claim was founded: on the entry in that account-book the plaintiff could not have sued for the entire debt found to have been due by defendant: s. 43 of Act X of 1877 therefore does not bar the suit: the decision in the former suit could not be questioned, and the plaintiff's account-book accepted then should have been accepted in the present suit.

I do not think that we are called upon to interfere under s. 622 of Act X of 1877. The Judge, on reviewing the whole case in regard to its former and present history, considers that s. 43 of the Act bars the present claim. It appears to me that the Judge is right, and I do not consider that, because in the second suit the Judge then in office decreed the instalments, the Judge now is debarred from considering what was the effect of that suit. In that suit the plaintiff ought to have sued for Rs. 800 the original debt, but chose to sue for that portion of it covered by an instalment. When the adjustment of accounts occurred a balance was struck against the defendant to the amount of Rs. 800. This

was demandable at once had the creditor been disposed to make the demand. But an arrangement was made between the parties that Rs. 800 should be payable in four yearly instalments, and a provision was added in regard to interest in case of default. The agreement came to was expressed in writing in the form of a promissory note, whereby the defendant acknowledged Rs. 800 to be due to defendants, and promised to pay the sum by yearly instalments of Rs. 200, and to pay interest in the event of default. The debt that was demandable at once no longer was so, but under the terms of the agreement or engagement could only be recovered as the instalments fell due. Default occurred and interest became chargeable. The plaintiff sued on the promissory note, but could not recover on it, as the document being unstamped could not be put in evidence. He was allowed to bring a new suit for the original debt. I cannot doubt that he could have sued then for Rs. 800, the sum found to have been due. But he did not do so, but sued for the instalments. For myself, I think that the decision then passed was wrong, because the entry made by Prag Das in his own books, to the effect that the balance was payable by instalments, is simply an entry and nothing more in his account-books, and could not charge the defendant with liability. It was necessary to establish the terms of the agreement under which instalments were payable. Was the plaintiff entitled to the sum claimed, being the balance of two instalments, which the defendant had agreed to pay by the written engagement which he had signed? This was the issue, and the terms of the agreement could be proved only by the document. It was not a case in which the statement of any fact in a document other than the facts referred to in s. 91 of the Evidence Act had to be proved. If it had been, oral evidence of that fact would have been admissible. But in this case the promise to pay the sum of Rs. 800, acknowledged to be due, by yearly instalments of Rs. 200, and interest in event of default, recorded the terms of the agreement. It is not as if *A.* gives *B.* a receipt for money paid by *B.*, and oral evidence is offered of the payment; such evidence is admissible. It is a fact stated in a document, but it is not evidence of the terms of a written contract. But if a contract is contained in a bill of exchange, a negotiable instrument, the bill itself must be proved. This written instrument, according to Taylor (6th

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ed., vol 1, p. 405), is to be regarded in some measure as the ultimate fact to be proved, and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. We are, however, guided by our Law of Evidence, and s. 91 seems clearly to apply. It is quite clear too that in asking for interest, as it was agreed to be paid under the conditions of the promissory note, the plaintiff is suing for something outside the debt that was found to be due on the adjustment of accounts. It is equally certain that he sues to recover instalments upon a book debt, though the balance constituting the debt was not payable by instalments, but was demandable at once. It was contended before us that there was a separate oral agreement to pay instalments. As to this the Judge now, if the contention was worth anything, finds in the case that there was no oral agreement whatever, and that there was no other agreement but that reduced to writing. Upon the facts found the account-book of Prag Das cannot help the plaintiff, for it proves no agreement to pay the debt of Rs. 800 by instalments. Under the circumstances I would not interfere, but would dismiss the petition with costs.

OLDFIELD, J.—The present suit does not appear to me to be barred by anything in s. 43 of the Civil Procedure Code, for the causes of action in this suit and in that previously brought are different. The plaintiff now sues for recovery of instalments which had not fallen due at the time he instituted the former suit. But it may be that the plaintiff is not in a position to maintain this suit without producing the "*satta*," and that being unstamped or insufficiently stamped is inadmissible in evidence. The terms of the agreement between the parties were embodied in the "*satta*," and are facts in issue in this suit, on the determination of which the decision depends, and they can only be proved by production of the document. I concur in rejecting the petition with costs.

Application rejected.

APPELLATE CIVIL.

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April 21.*Before Mr. Justice Spankie and Mr. Justice Straight.***MUHAMMAD ISMAIL KHAN (DEFENDANT) v. FIDAYAT-UN-NISSA
AND OTHERS (PLAINTIFFS).****Muhammadian Law—Presumption as to legitimacy of son—Custom of primogeniture.*

Observations on the law laid down by the Privy Council regarding the presumption of legitimacy which arises, under the Muhammadan law, in the absence of proof of marriage, when a son has been uniformly treated by his father and all the members of the family as legitimate.

Also on the law laid down by the Privy Council regarding the custom of primogeniture and the exclusion of females and other heirs from inheritance.

THE facts of this case, so far they are material for the purposes of this report, were as follows:—One Ghulam Ghaus Khan, a Biluch, and a Muhammadan (Sunni), whose ancestors had for many years been settled at Jhajhar in the Meerut district, died on the 6th November 1879, possessed of considerable moveable and immoveable property situate in that district. He left a will, bearing date the 5th November 1879, the material clauses of which were as follows:—(iii) All the servants who are at present in service shall be retained in service as heretofore, provided they continue to maintain their good character. (iv) Certain female slaves who were bought by me are in my keeping; one of them, Nanhi Begam, has also got children; if she continue to be of good character, she and her children shall continue to receive allowances as heretofore; the other female slaves shall also continue to receive similar allowances. (v) I appoint Muhammad Ismail Khan, my son, whom I have already intrusted with the management of the estate for a period of five years, as executor of this will; he should take absolute possession of the entire estate, and manage all the villages according to his discretion as he has hitherto done. (vi) if the sisters of Muhammad Ismail Khan at any time come to or settle in Jhajhar, he shall not overlook to provide for them for their necessary expenses according to his means, as is the usage of our family. (viii) Muhammad Ismail Khan is the absolute proprietor of my entire estate, and no person is authorized to interfere

* First Appeal, No. 100 of 1880, from a decree of Rai Bakhtawar Singh Subordinate Judge of Meerut, dated the 14th July 1880.

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with his possession and powers; if by any reason Muhammad Ismail Khan, executor, shall be obliged to leave Jhajhar, he shall have power to appoint any of his relations or issues, whom he may think fit, as manager of the estate like himself." In May 1880, the three daughters of Ghulam Ghaus Khan, viz., Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, and Nanhi Begam, calling herself the lawful wife of Ghulam Ghaus Khan, and the issue of Nanhi Begam by Ghulam Ghaus Khan, viz., Mustahkam Khan, Naim Khan, Mukim Khan, and Himayat-un-nissa, calling themselves the lawful issue of Ghulam Ghaus Khan, brought the present suit against Muhammad Ismail Khan, the son of Ghulam Ghaus Khan, for possession of their shares of his father's estate. The defendant set up as a defence to this suit that Nanhi Begam was not the lawful wife of Ghulam Ghaus Khan, and her children by him were illegitimate, and therefore her claim and that of such children to inherit Ghulam Ghaus Khan's estate was not maintainable; and that by the custom of the family, which the will of Ghulam Ghaus Khan recognized and affirmed, the eldest son succeeded, and females were excluded from succession; and therefore the claim of the other plaintiffs, the daughters of Ghulam Ghaus Khan, was not maintainable. The Court of first instance fixed the following issues, amongst others, for trial:—"Is Nanhi Begam the married wife of Ghulam Ghaus Khan, or his mistress; is she, and are her children, entitled to inherit? Are the daughters of Ghulam Ghaus Khan entitled to inherit, or are females in the family of Ghulam Ghaus Khan not entitled to inherit, and the eldest son alone succeeds and other members of the family are excluded from inheritance? How far can the will be acted on?" The Court found on the evidence in the case that the children of Nanhi Begam by Ghulam Ghaus Khan had been uniformly treated by their father and his lawful daughters and son as legitimate; and held, relying on *Khajooroonissa v. Rowshan Jehan* (1) and the Privy Council decision therein cited (2), that it must be presumed that Nanhi Begam was the lawful wife of Ghulam Ghaus Khan, and her children by him legitimate. It also found that there was no such custom of succession in the family of Ghulam Ghaus Khan as was set up

(1) I. L. R., 2 Cal. 184; S. C., 3 (2) *Khajah Hidayat Oollah v. Bai Jan Khanum*, 3 Moore's I. A., 295.
 L. R. Ind. App., 291.

by the defendant, and it held, relying on *Khajooroonnissa v. Rowshan Jehan* (1), that according to Muhammadan law a devise of property could not be made to one heir to the exclusion of the other heirs without their consent; and that therefore the plaintiffs could not be excluded from inheriting by the will of Ghulam Ghaus Khan in the defendant's favour. It accordingly gave the plaintiffs a decree for their legal shares of the estate of Ghulam Ghaus Khan.

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The defendant appealed to the High Court. On his behalf it was contended, on the evidence, that Nanhi Begam had not been treated by Ghulam Ghaus Khan and the members of the family as his wife or her children by him as legitimate; and that the custom of succession in the family set up by him was proved.

Mr. Conlan and Pandits *Bishambhar Nath* and *Ajudhia Nath* for the appellant.

Mr. Ross, the Junior Government Pleader (*Babu Dwarka Nath Banarji*), and Munshi *Hanuman Prasad* for the respondents.

The material portion of the judgment of the Court (SPANKIE, J. and STRAIGHT, J.) was as follows:—

SPANKIE, J.—With regard to the finding of the lower Court as to the status and treatment of Nanhi Begam and her children in the house of Ghulam Ghaus Khan, the decision of the Subordinate Judge is open to the exceptions taken in appeal. The Subordinate Judge indeed admits that there is no proof of the performance of an actual marriage between Ghulam Ghaus Khan and Nanhi Begam. Two witnesses say that they attended it. But the lower Court does not believe their evidence. One Taj Muhammad Khan certainly deposes that he was present, but he does not remember the date of the marriage. He knows that Budh Shah was “vakil.” Budh Shah, however, deposed that he was not the “vakil,” nor had he attended or been invited to the marriage. The witness, too, appeared hostile to Ghulam Ghaus Khan and Ismail Khan. He says that both sued him for arrears of rent and for loans. Murtiza Khan, the other witness, deposed that Budh Shah was the “vakil”; that he attended the marriage being on leave from his regiment, the

(1) I. L. R., 2 Calc., 184; S. C. 3 L. R. Ind. App., 291.

1881 7th Cavalry. He says that the marriage was in April, but he does not remember the year. He is a relative of Taj Muhammad Khan. The lower Court remarks that this witness had no leave papers. These, to be sure, might have been lost in twenty years, but it does not appear that Murtiza Khan set up this excuse for not producing them. This evidence, we agree with the Subordinate Judge, is not sufficient to prove that any marriage was performed between Ghulam Ghaus Khan and Nanhi Begam, and indeed it is not alleged to have occurred in any particular year or on any particular date, either in the plaint or elsewhere. The plaint assumes Nanhi Begam to have been the wife of Ghulam Ghaus Khan. She is so described in the heading, but there is no reference to any marriage in the body of the plaint. But the lower Court, having found that there was no actual marriage, goes on to presume from the evidence of the plaintiff's witnesses that Nanhi Begam was Ghulam Ghaus Khan's wife, and that her children by him were legitimate. He lays it down that, when a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises, under the Muhammadan law, that the son's mother was his father's wife, although conclusive proof of marriage be wanting. He also insists on the rule that the children born of a prostitute and an unmarried woman shall, if they have been admitted by the father to be legitimate, and treated by him as such, be held to be legitimate. He cites the judgments of the Privy Council in the cases of *Khajooroonnissa v. Rowshan Jehan* (1) and *Ashrufod Dowlah Ahmed Hossein v. Hyder Hossein* (2) in support of this rule. But the Subordinate Judge has not sufficiently considered the evidence and circumstances of the case and whether there are sufficient grounds for the presumption he has made. It is true that in the case of *Ashrufod Dowlah Ahmed Hossein* (2) their Lordships affirm the principles laid down in the cases of *Mahomed Bauker Hoossain v. Shurfoon Nissa Begum* (3). They do not question the position that according to the Muhammadan law, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances, without proof, either of a mar-

(1) I. L. R., 2 Calc., 184; S. C., 3

(2) 11 Moo. I. A., 94.

L. B. Ind. App., 291.

(3) 8 Moo. I. A., 136.

riage between the parents, or of any formal Act of legitimation. But the presumption of legitimacy from marriage according to the judgments of their Lordships, follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation: an antenuptial child is illegitimate: a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. But their Lordships add to these observations the following warning and caution, which the lower Court seems to have lost sight of. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. In the same case, referring to *Khajah Hidayut Oollah v. Rai Jan Khanum* (1), their Lordships observe that the cohabitation spoken of in that judgment was continual: it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. These remarks are most important in their bearing upon the case now before us, in which there is no actual proof of any marriage, and no marriage was ever acknowledged by Ghulam Ghaus Khan. On the contrary, if the will be admitted as genuine, marriage was repudiated by him, since he calls Nanhi Begam a slave-girl in his

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keeping, and refers to the children as his children by her as a mistress, if he refers at all to them as his own. In a later judgment to be found in *Jariut-oll-butool v. Hoseini Begum* (1) their Lordships say:—"If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is that things remain in their original state. In that case the man cohabited with the woman who had been a prostitute, or who lived in his house. At his death she claimed to be his wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. In the case of *Khajooronnissa v. Rowshan Jehan* (2) on which the Subordinate Judge relied, where their Lordships deal with the right of the plaintiff to succeed to Bebee Lodhun, they say that the answer depended upon whether Bebee Lodhun was merely a concubine or a wife. The presumptions in that case were inferences of fact. Their Lordships find that it was an undisputed fact that the son of Bebee Lodhun was treated by his father and by all the members of the family as a legitimate son, and as the other legitimate sons. Here some presumption is raised that his mother was his father's wife. But the presumption might be rebutted. Their Lordships found that it was not rebutted. On the contrary, there had been an undoubted acknowledgment by the father that Bebee Lodhun was his wife, inasmuch as when his principal wife sued him, he objected on the ground that Bebee Lodhun one of the other wives, was not joined. We must apply the principles laid down in these decisions to the facts and circumstances of the particular case before us, and then determine whether any and what presumptions arise favourable to the plaintiffs, and if there are presumptions in their favour, whether they have or have not been rebutted.

Now, what does the evidence for the plaintiffs disclose and how far is the evidence reliable? (After an examination of such evidence the learned Judge continued): Such is the evidence

(1) 11 Moo. I. A., 194.

(2) I. L. R., 2 Calc., 184; S. C.,
 L. R., 3 Ind. App., 291.

to prove marriage, and such treatment both of Nanhi and her children that a presumption arises that she lived with Ghulam Ghaus Khan as his wife and the children were regarded as legitimate by him. It may be admitted that, if the evidence of the two daughters could be accepted, the presumption might arise. But that evidence was not taken in Court and is not reliable for the reasons given. It is the evidence of persons determined to say the same thing by previous concert, and it is the evidence of persons hostile to the defendant.

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It seems, however, upon such evidence that the presumption as to the treatment of Nanhi as a wife and of the children as legitimate by Ghulam Ghaus Khan does not fairly arise; but if it does, the evidence on the other side sufficiently rebuts the presumption. (After referring to and considering the evidence against such presumption the learned Judge continued:) On the whole, then, after full consideration of the case, looking at the evidence for the plaintiffs and that for the defendant, that for the latter appears more reliable, supported as it is by what documentary evidence there is of the mind and admission of Ghulam Ghaus Khan himself in regard to the position occupied by Nanhi and her children in his house. There is undoubtedly no marriage proved. There seems too to be no doubt that Nanhi was taken into Ghulam Ghaus Khan's house at an early age, and that when she was old enough for such purpose he cohabited with her, and continued to do so for years; but there is no sufficient evidence to show that he ever recognized her as his wife or in any other character than that of a concubine, or the children in any other character than that of his illegitimate issue. We therefore cannot but conclude that Nanhi was not the wife of Ghulam Ghaus Khan, and that the children were born illegitimate, and have never been legitimated by treatment in the house of their father as legitimate, and on this ground the suit of Nanhi and her children must fail.

There now remains the question as to the alleged custom of primogeniture, and the exclusion of the females and other heirs from inheritance. Such a custom must be established by those who allege its existence. What is set up is a family usage

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not connected with a raj or principality,—*Surendronath Roy v. Heeranmonee Burmoncah* (1), and it has been laid down that the prevalence in any part of India of a special course of descent in a family differing from the ordinary course of descent in that place of the property of people of that class or race stands on the footing of usage or custom of the family,—*Abraham v. Abraham* (2). It must have had a legal origin and have continuance, and whether property be ancestral or self-acquired, the custom is capable of attaching and being destroyed equally as to both. Assuming, though it is not directly or indirectly so set out in the pleadings, and the evidence upon the point is of the vaguest kind, that the Emperor Humayun granted the village in 1550 A.D. to Syed Muhammad Mir Khan in reward for his services, and with the condition that the rule of primogeniture should attach to it, it is certain that there is no evidence of the grant itself (even if it were a legal one, of which there might be some question), still less is there any evidence that from the date of the occupation of the district by the British Government there was any claim made on behalf of the representative of the original grantee that primogeniture was the rule of the family; nor has any such claim been recorded up to the date of the present suit, though there have been intermediately settlements and revision of settlements. The family is a Biluch family, and it is not denied, but proved, that they are Muhammadans of the Sunni sect. It is in evidence that there are Biluchis of the same common descent and of the neighbourhood among whom such a rule does not prevail. It is quite contrary to the Muhammadan law of inheritance, and of course contrary to the ordinary course of descent amongst families of Sunnis of the pargana and district. (The learned Judge, after considering and commenting upon the evidence on both sides regarding the alleged custom of primogeniture, continued as follows :) We have now reviewed the evidence on this part of the case, and our conclusion is that defendant has not established a special course of descent in Jhajhar and the district of Bulandshahr, in which so many Biluchis and foreigners are settled, who are all Muhammadans and Sunnis; that no legal origin of such custom is shown; and if it had been, that no continuance of it has

(1) 12 Moo. I. A., 81.

(2) 9 Moo. I. A., 224.

been proved : and therefore we must hold the point to be established against the defendant. It is admitted that, if the plea of family usage fails, the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed. The result of our judgment on the whole case is that the claim of Choti Begam, otherwise Nanhi Begam, as wife, and of Mustahkam Khan, Naim Khan, Mukim Khan, otherwise Raffi Khan, minor sons, and of Himayat-un-nissa, minor daughter of Ghulam Ghaus Khan, under the guardianship of Mustahkam Khan, is dismissed altogether, with costs : but that the claim of Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, daughters of Ghulam Ghaus Khan, in respect of their shares, must be decreed as against the defendant, and therefore the shares of these ladies under the Muhammadan law are hereby decreed against Muhammad Ismail Khan, with costs. We are not disposed to diminish their shares because they were associated with Nanhi and her children in the litigation, as the circumstances of the case may account for the fact of this association.

Decree modified.

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Before Mr. Justice Spankie and Mr. Justice Oldfield.

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AND ANOTHER (DEPENDANTS).*

Muhammadian Law—Gift—"Marz-ul-maut."

According to Muhammadan law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i.e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi v. Bibbun Bibi* (1) followed.

Held therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Muhammadan law.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Hanuman Prasad for the appellant.

* First Appeal, No. 68 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 11th February 1880.

(1) N.-W. P. H. C. Rep., 1874, p. 159.

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Pandit *Ajudhia Nath* for the respondent *Mariam Begam*.

Shah Asad Ali for the respondent *Nirali Begam*.

The judgment of the High Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

SPANKIE, J.—The facts of the case sufficiently appear in the judgment of the lower Court. Ghulam Nabi Khan was admittedly a respectable resident and owner of property in Kadir Ganj in the Etah district, who died childless on the 15th December 1878. His heirs were the plaintiff and Nirali Begam, his brother and sister, and Mariam Begam his wife. But during his lifetime, and whilst ill, he executed a deed of gift on the 15th September 1878 in respect of all his property in favour of his wife, which deed of gift was registered on the 17th September 1878, under a power of attorney to Abdul Ghani Khan attested on the 7th September 1878. The plaintiff avers that, when the deed was executed, Ghulam Nabi was not in his right senses, and was suffering from death illness, and the deed was invalid; and he (plaintiff) claims the entire property, asserting that, according to custom, Nirali Begam, his sister, took no share. The main point was whether the deed was executed before or during the donor's death illness, and whether he was in full possession of his senses. The judgment is not as clear as it might be on the first point. On the second the Subordinate Judge entertains no doubt that Ghulam Nabi Khan was in possession of his proper senses when he executed the deed, and that he did so in order to secure his property to his wife, and to prevent his brother obtaining any share of it. But the remaining portion of his judgment is not so clear. The contention for the wife had been that, if a man falls sick and dies within a year the whole of that time cannot be held to be the duration of death illness, but only so much of it can be so considered that covers the increased illness until it proves fatal, and during which time death is apprehended. The Subordinate Judge, however, did not accept this view, but held the Muhammadan law to be that, when the patient dies within a year, the illness will be deemed a death illness, but when it continues for a long time, it becomes a part of his constitution, and he has no fear of death, and if the illness continues for more than a year

in this shape, then the state of that man is regarded as equal to one of health. But if the sickness again increases, and the patient dies, the period of such increased illness is the duration of the death illness. Numerous authorities are cited in the judgment, and the Subordinate Judge held the gift to be invalid by reason of its having been executed during death illness. There were, however, other points in dispute. It had been urged that a portion of the property conveyed by the gift was undefined and undivided; and for the wife it had been contended that her dower of Rs. 60,000 had not been paid, and she was in possession of the property: the plaintiff had advised Ghulam Nabi Khan to take another wife in order to raise issue to himself, which produced disagreement between her husband and herself: she demanded her dower, and an agreement to settle the matter by arbitration was drawn out; but before the arbitration was carried out, Ghulam Nabi Khan with the plaintiff's consent and by his advice had the deed of gift executed, but plaintiff artfully contrived that no mention of the dower was made in the deed: but she took possession of all the property on her husband's death, and according to the custom of the family a childless widow succeeds to the property of her husband. The plaintiff disputed the amount of dower, which he stated to be 100 gold dinars, i.e., Rs. 350, which had been paid. He also denied that there was any special custom as to childless widows in the family. The Subordinate Judge, having declared the deed of gift to be invalid, pronounced no decision on the other points in dispute. But he did not give possession to plaintiff or go into the question of amount and payment or non-payment of the dower, because there was no prayer for relief in respect of the dower, and a suit for the determination of the amount of the dower due to defendant should have been brought. All parties were dissatisfied with the decision. The plaintiff in appeal contends that the Subordinate Judge should have disposed of the question of dower: the plea had been raised by the widow, and there was no legal bar to the determination of the point: the issue had been framed and the parties had come prepared with evidence in support of their several contentions. Nirali Begam, the sister of Ghulam Nabi Khan, objected that she ought to have been made a plaintiff, as she was equally

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entitled with plaintiff to her share of the property left by Ghulam Nabi Khan, but the Subordinate Judge had not considered her application. She denies that there is evidence to prove the execution of the deed of gift or that it was ever acted upon: the lower Court should not, in cancelling the deed, have decreed more than his share to plaintiff, as she (Nirali Begam) was entitled to one-fourth share: the record shows that Ghulam Nabi Khan's widow had taken possession of the property without the consent of the lawful heirs; this is not possession in lieu of dower. Mariam Begam, the widow, objected that the donor was not suffering from death illness when he executed the gift, which was therefore valid: as the dower had not been paid and as the lower Court had found that deceased had been desirous of paying it, the Subordinate Judge should have held that the gift was made in consideration of the dower.

After giving our best attention to the evidence in this case, we find that it will be unnecessary to consider the plaintiff's appeal at any length; because, on the evidence, we have come to the conclusion that the deed of gift must be regarded as valid. The appeal does not raise the question whether any portion of the property conveyed by the gift was "*mushan*" (undivided), and indeed there is no satisfactory evidence on record to show that it was so. As to the law relating to "*marz-ul-maut*" or "fatal disease," we have only to follow the precedent of this Court—*Labbi Bibi v. Bibbun Bibi* (1)—which, up to the present time, has been our admitted authority in such cases. It is declared to be the law that persons labouring under a death sickness are incapable of making a valid gift or of disposing of their property in charity. If, however, possession has been given of the subject of the gift, it is valid to the extent of one-third of the sick man's estate. But it was pointed out that, if the law be unrestricted in its operation, it would deprive persons who are suffering from lingering diseases, but who at the same time are in full possession of their senses and free from the influences which sometimes affect those who are labouring under mortal sickness, of all power of dealing with their property. "The law therefore," the learned Judges say, "provides that, where the

(1) N.-W. P. H. C. Rep. 1874, p. 159.

malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of the whole of his property. It also goes on to define what constitutes a malady of long continuance, and, as is admitted by both parties to this suit, when the sickness has lasted for a year, and there is no immediate danger of death, the incompetency to make a gift of the whole of the property" is removed. Now the law here laid down appears to us to apply in all respects to the circumstances of the case before us. As to the donor's possession of his senses at the time the deed was executed, the Subordinate Judge himself had no doubt on the evidence, and on this evidence we fully coincide with him. The plaintiff fails to establish as against the wife, or Abdul Ghani, who is the son-in-law of the brother-in-law of Ghulam Nabi Khan, any fraudulent conduct whatever in regard to the preparation, execution, and registration of the deed of gift. He likewise fails to establish any collusion between the widow and Abdul Ghani in order to effect any fraudulent conveyance of the property; whatever was done was openly and publicly done. There seems to be no doubt whatever that there had been some dispute between Mariam Begam and her husband, and she had demanded her dower, and the explanation given of the disagreement appears to be very reasonable. Mariam would not patiently endure, after so many years, that another wife should be introduced into the house. There is proof that the husband and wife executed an agreement on the 30th August 1878, in which the dispute regarding the dower is admitted, and one Muhammad Mir Khan is appointed as arbitrator to settle the matter. Muhammad Mir Khan was examined, and deposed that he had been appointed arbitrator under this agreement, which had been in his possession but which was returned by him to Ghulam Nabi Khan and Mariam Begam, as they had come to an amicable arrangement. Sahibdad Khan, who signed this agreement, attested his signature. We see no reason to doubt the truth of these depositions. There is, too, the deposition of one of the witnesses for the plaintiff, Sahibdad Khan, Head Constable of Mehrara Station, which is worthy of notice on this point. This witness in the course of his evidence states that a report was made on the 26th August 1878 by Gulshere Khan (the present plaintiff) to the effect that Ghulam Nabi Khan, his

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brother, was very ill, and not in his senses; that he and Ghulam Nabi Khan were not on good terms; that he did not go to him; and that he had heard that Maulvi Abdul Ghani, who was with Ghulam Nabi Khan, had fabricated some document; and that should he have done so he begged that it might be held invalid. Now, it is remarkable that the agreement was not executed until the 30th August, four days after this report was made, and it is certain that at the time of its execution Ghulam Nabi Khan was in his right mind; and from the evidence of Muhammad Mir Khan and Sahibdad Khan already referred to, that there had been no concealment, and that the agreement was so far acted upon that it was deposited with the arbitrator and only returned by him because the parties came to an arrangement between themselves and no award was required. The nature and terms of the report are such that we are led to infer that it was made by the plaintiff for his own ends, and that he did not really believe then that any fraud was in contemplation, but that he knew of the intention of Ghulam Nabi Khan to make good the dower, and that he himself as a precaution, by way of "*peshbandi*" or arrangement beforehand, wished to produce this report hereafter in proof of a fraudulent design on the part of Abdul Ghani to procure a settlement adverse to his (plaintiffs) interests. The Subordinate Judge himself accepts the conclusion that Ghulam Nabi Khan, being displeased with plaintiff and his nephew, Shere Ali Khan, executed the gift, because if he had not done so the plaintiff would have got a share of the property at his death, and this he did not wish. But as there is no reason whatever to doubt that the agreement of the 30th August was an instrument executed in good faith, it seems very reasonable to believe that the deed of gift of the 15th September 1878, a fortnight later in date, was executed by Ghulam Nabi Khan in pursuance of an amicable arrangement with his wife, and for the purpose of putting her in possession of all the property in consideration of the dower still due to her. The property was entirely his own, and to whom should he give it more naturally under the circumstances than to his wife? The Subordinate Judge fully admits that "the allegation of the plaintiff that Abdul Ghani secretly and by way of sharp practice got the deed of gift and the power to get it registered executed is evidently false. On the other hand, it is

satisfactorily proved that he was all along thinking of adopting measures by which his wife, the defendant, would get the property, and the plaintiff would get no share of it."

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So far, then, we are agreed that Ghulam Nabi Khan was in his sound senses when he executed the deed of gift, and that it was no sudden whim which made him execute it, but that he did so in pursuance of a foregone purpose. It remains now to consider what the evidence discloses as to Ghulam Nabi Khan's state of health when he made the gift. The Subordinate Judge himself allows that his illness commenced in the end of 1874 or beginning of 1875. But he does not consider it proved that the same sickness continued till his death, or that the sickness of which he died may be called as old or advanced sickness. He thinks that the sickness of which deceased died commenced in July 1878. The plaintiff's witnesses are called to prove that Ghulam Nabi died of an illness of about 5 or 5½ months' standing. The evidence of these witnesses is not of a reliable character. (After referring to the evidence of these witnesses and commenting thereon, the learned Judge continued): Such is the evidence upon which the plaintiff seeks to establish that the deceased was taken ill in June 1878, and died of his illness on the 15th November following. On the other hand, Muhammad Mir Khan, the arbitrator already referred to, Raza Ali Beg, Hafiz Ali Khan, and other respectable persons depose that Ghulam Nabi Khan had been suffering from boils; that they had got well; that he fell ill again and died. The deposition of Niaz Ali shows that Ghulam Nabi had been ill in 1874 from fever and boils, which lasted a long time, and that afterwards before his death he was attacked with swelling of the hands and feet, and died. None of the evidence, either for the plaintiff or defendant, appears to us to be of such a conclusive character that, in the words of the Subordinate Judge, it would be possible to say whether Ghulam Nabi Khan died of the same illness, or whether he had recovered from it and died of other sickness, such as dropsy, fever, or inflammation of the liver, the evidence on behalf of the parties being conflicting. The Subordinate Judge then states his own conclusion:—"Taking the evidence produced on behalf of both parties simultaneously into consideration, the Court thinks that it can fairly be concluded that at first Ghulam Nabi Khan had a boil, and in consequence thereof,

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or at the same time, he was attacked by fever and his hands and feet swelled, and during a large portion of the time of his illness he suffered most from the boil, but it lessened for a time about the date of his death, and he was a little better. But it appears that the boil was outwardly and superficially cured, and the sore seemed somewhat healed up, yet inwardly its effect was present, and it was not completely cured, then the swelling and fever increased and he died, till that time he was not relieved of the original malady of the ulcer." This can hardly be regarded as a satisfactory conclusion. For ourselves we think that there is sufficient evidence to warrant the finding that for a long time past, from 1874 up to July 1878, Ghulam Nabi Khan had been a sufferer from boils or a carbuncle, it is not possible to say which with any distinctness, and ultimately died; but that when he executed the deed of gift there was no immediate apprehension of his death; that twenty days before his death his surgeon thought that he would get well, but he did not get better, but became weaker under treatment, and finally died, but whether from the boil, or from some other supervenient disease, there is no satisfactory evidence to show. Under these circumstances, we are not disposed to say that the deed of gift executed by Ghulam Nabi Khan was invalid under the Muhammadan law. We are therefore compelled to annul the decree of the lower Court and to dismiss the claim *in toto*. It is unnecessary here to consider the objections of Nirali Begam whilst those of Mariam Begam have been disposed of by the judgment. Appellant will pay his own costs and those of Mariam Begam; Nirali Begam will pay her own costs in this Court.

Decree modified.

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 April 5.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BHAONI (PLAINTIFF) v. MAHARAJ SINGH (DEFENDANT).*

Regulation VII of 1822—Award—Act IX of 1871 (Limitation Act), sch. ii, No. 44—Act XV of 1877 (Limitation Act), sch. ii, No. 45—Hindu Law—Succession—Custom—Illegitimate son—"Gundharp" marriage.

D died in 1860, leaving him surviving his first wife G, his second wife B, his mother B, and M, his son by a woman to whom he had been married by

* First Appeal, No. 57 of 1880, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Sháhjahánpur, dated the 6th December 1879.

the "*gandkarp*" form of marriage. On *D*'s death *G*'s name was registered in the record-of-rights in respect of his proprietary rights in a certain village. In 1871 *G* died, and on her death *B*, *R*, and *M* preferred separate claims to have their names registered in respect of such rights. The Assistant Settlement Officer before whom these claims came for decision, professing himself unable to decide which of the claimants was in possession, and observing that it was not shown that possession was joint, referred the case to the Settlement Officer. The Settlement Officer, without making any inquiry, disposed of the case on the evidence taken by the Assistant Settlement Officer, and held that the claimants were in joint possession of such rights, and it was proper that the name of each should be registered in respect of a one-third share of such rights. He at the same time intimated to the parties that, unless they settled their claims in the Civil Court or by arbitration before the *khewat* was framed, it would be framed as he had directed. In 1873 *R* died, and on her death *M* procured the registration of his name in respect of her one-third share. In 1879 *B* sued *M* for possession of the one-third share which he had obtained under the proceeding of the Settlement Officer, and of *R*'s one-third share, claiming as heir to her deceased husband *D*, and alleging that *M* was not the legitimate son of *D* and was therefore not entitled to succeed to such rights. *M* set up as a defence that, as the proceeding of the Settlement Officer was an award under Regulation VII of 1822, and the suit was one to contest such award, and it had not been brought within three years from the date of such award, the suit was barred by limitation; that he was the legitimate son of *D* and therefore entitled to succeed; and that, assuming he was not legitimate, he was entitled to succeed by the custom of the village. In support of such custom *M* relied on the following entry in the village *wajib-ul-arz*:—"In this village a mistress treated as a wife and the child of such a mistress shall also have a right to transfer property and to obtain and receive property."

Held that the suit was not barred by limitation under No. 44, sch. ii of Act IX of 1871, or No. 45, sch. ii of Act XV of 1877, as the proceeding of the Settlement Officer was not an award under Regulation VII of 1822.

Held also that a marriage by the "*gandkarp*" form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the *status* of wife and making the offspring legitimate. Also, with reference to the entry in the *wajib-ul-arz*, that it did not necessarily place illegitimate children on an equality with legitimate as heirs; and if that was its intention it was ineffectual, as parties could not by agreement alter the law of succession; and if the entry was regarded as evidence of custom it was not conclusive.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), Lala Lalta Prasad, and Babus Oprokash Chander Mukarji and Jogindro Nath Chaudhri for the appellant.

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v.	
MAHARAJ	The judgment of the High Court (SPANKIE, J., and OLDFIELD,
SINGH.	J.) was delivered by

OLDFIELD, J. (SPANKIE, J., concurring) :—The plaintiff (Bhaoni) is the second wife of Dariao Singh who died in 1860, leaving surviving him his first wife Ganesh Kuar, his second wife Bhaoni, his mother Raj Kuar, sister Mahtab Kuar, and three daughters; also Ajit Kuar alleged to be his concubine and her son Maharaj Singh, defendant and respondent in this case. On the death of Dariao Singh in 1860 Ganesh Kuar was entered in the settlement record, and when she died in 1871 the plaintiff and Raj Kuar and Maharaj Singh were recorded as heirs and entitled to equal shares. Raj Kuar died on the 5th January 1873, and Maharaj Singh obtained entry of his name in respect of her one-third share on the 22nd March 1873. It appears also that in 1872 Maharaj Singh sued the plaintiff (Bhaoni) and Raj Kuar to set aside the order of the Settlement Officer passed in 1871 declaring those ladies entitled to a third share each in the estate, and to establish his own title to the whole of the property left by Dariao Singh. The matter in dispute was referred to arbitration, and the arbitrators decided that Raj Kuar, and not Bhaoni or Maharaj Singh, was entitled to the property, on the ground that Bhaoni had forfeited her right by unchaste conduct, and that Maharaj Singh was illegitimate. The suit brought by Maharaj Singh was in consequence dismissed on the 16th August 1872, and the decision was affirmed by the High Court on the 21st July 1873. Subsequently in 1874 the sister and daughters of Dariao Singh sued Bhaoni, plaintiff in this case, and Maharaj Singh, defendant in this case, to recover the property left by Dariao Singh, and to set aside the order of the Settlement Officer; they sued as heirs of Raj Kuar. This suit was ultimately dismissed by the High Court on the 3rd March 1879, which held that the right of inheritance to her husband Dariao Singh's estate had vested in Bhaoni by law long before she was guilty of misconduct, and in her presence as heir to Dariao Singh none of the plaintiffs had any right to succeed to the estate. Raj Kuar having died in 1873 and Maharaj Singh having obtained

entry of his name in respect to the one-third share which she had obtained under orders of the Settlement Officer in 1871, the plaintiff (Bhaoni) has brought this suit, which was instituted on the 1st September 1879, for two-thirds of the estate of Dariao Singh, namely, the shares which had been given to Raj Kuar and Maharaj Singh by the order of the Settlement Officer in 1871. The defence of Maharaj Singh is that he has held adversely to the plaintiff beyond the term of limitation; that the orders passed in 1871 declaring his right to one-third and in 1873 in respect of his right to Raj Kuar's share have become final and conclusive as awards, no suit having been brought within three years to set them aside; that plaintiff is estopped by her conduct from disputing his title; that he is the legitimate son of Dariao Singh, and assuming him to be the son of a concubine (*dharoka*), he is entitled to succeed according to the custom of the village. The Subordinate Judge has held that the defendant has not been in adverse possession for twelve years, but that the suit, so far as it refers to the one-third share which the defendant obtained under the order of the 15th November 1871, is barred by limitation of three years, that order being an award which has not been set aside. He held that the plaintiff is estopped by her conduct from bringing this claim. He refers to her statement of the 23rd June 1860, to the effect that Maharaj Singh is her heir; to her recognizing his right by applying for partition of the one-third share she obtained under the order of the Settlement Officer dated the 15th November 1871; and her consent to his being appointed lambardar dated the 13th February 1876, and her recognition of his right to the two-thirds in suit by applying to have it sold in execution of a decree against the defendant. He further held that Maharaj Singh is the son of Dariao Singh by Ajit Kuar his concubine, and the marriage in the *gandharp* form is valid; and that he is also entitled to succeed by the custom in Pirthipur according to which the offspring of a *dharoka* (concubine) inherits. The plaintiff appeals on the ground that the suit is not barred by the three years' limitation; that the previous litigation is conclusive of the plaintiff's right and of the absence of any title in defendant; that there is no estoppel; and that Maharaj Singh is illegitimate and has no right of inheritance.

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I am of opinion that the Subordinate Judge has wrongly held that any portion of this claim is barred by limitation under art. 44, Act IX of 1871, or art. 45, Act XV of 1877, as the order of the Settlement Officer dated the 15th November 1871 is not an award under Regulation VII of 1822 which it was necessary to set aside within three years under the Limitation Act. On referring to the proceedings in the settlement department, we find that, on the death of Ganesh Kuar, the Settlement Deputy Collector instituted inquiries as to who should be recorded in her place, and Bhaoni (plaintiff), Raj Kuar, and Maharaj Singh (defendant) preferred claims. The Deputy Collector, after making inquiry, recorded a proceeding to the effect that Ganesh Kuar, who was proprietor in possession, had left as her heirs Raj Kuar, her mother-in-law, Bhaoni, and Maharaj Singh, described as the son of Dariao Singh by his mistress Ajit Kuar. The Deputy Collector, after referring to the proceedings taken on Dariao Singh's death, when Bhaoni and Raj Kuar had consented to allow the name of Ganesh Kuar to be entered, with the understanding that Bhaoni should be recorded at her death and Maharaj Singh after Bhaoni's death as the last heir, proceeds to record that the dispute before him was between Raj Kuar, Bhaoni, and Maharaj Singh. The first-named set up her own right, alleging Maharaj Singh was illegitimate. Bhaoni claimed that she should succeed under the arrangement made in 1860, and Maharaj Singh claimed to be the heir and disputed any title on the part of Bhaoni by reason of her unchastity. The Deputy Collector finally records that he is unable to come to any conclusion on the question of which party is in possession, and referred the case to the Settlement Officer with these words: "The circumstances of joint possession are not clear; the case is an intricate one; and criminal cases, &c., between the parties are apprehended; and it is observed that they keep up with them a large following with the view of disturbance; it is absolutely necessary that final orders be passed by the Settlement Officer." The papers appear to have been sent to the Settlement Officer, who without making any inquiry disposed of the case on the evidence taken by the Deputy Collector of Settlement, and held that all the three claimants had joint possession of Dariao Singh's property, and it was proper that the

names of each in equal shares should be substituted for that of Ganesh Kuar, and the order was passed to that effect, and it was intimated that, unless they settled their claims in the Civil Court or by arbitration before the *khewat* came to be prepared, it would be prepared according to the above directions. This proceeding, however, of the Settlement Officer does not constitute an award under Regulation VII of 1822. It does not appear to have been made after opportunity given to the parties to establish their respective claims before the Settlement Officer or upon evidence taken by that officer. The Regulation contemplates that the Settlement Officer shall act as a Court of Civil Judicature (s. 23). He must have the parties before him and give them opportunity for establishing their claims, and must adjudicate on evidence taken before him, and an order passed like the one before us upon a reference made by some other officer on inquiries instituted by him has no element of a judicial character, so as to give the order the authority of an award under the Regulation. The defect is not one of mere irregularity of procedure, but it strikes at the root of the proceedings before the Settlement Officer and takes from them all pretence to be of a judicial character. The Subordinate Judge has rightly held that there is no bar to the claim with reference to the order of the 22nd March 1873. (After holding that the plaintiff was not estopped by her acts and conduct from bringing any portion of her claim, and that her claim was not barred with reference to the decisions in the former suits, nor by the adverse possession of the defendant for twelve years, the learned Judge continued): The above remarks dispose of all the preliminary objections to the maintenance of the suit; and the plaintiff will have a right to the property as widow of Dariao Singh, unless the defendant can show a better right as the son of Dariao Singh. It is quite clear that his mother Ajit Kuar was not married to Dariao Singh by any form of marriage recognized by Hindu law among Rajputs. The marriage by the *gandharp* form, which it is contended is valid, is nothing more nor less than concubinage, and has become obsolete as a form of marriage giving the *status* of wife and making the offspring legitimate; and the contention that the illegitimate son can inherit under the custom of the village and family is not

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established. Such a custom is opposed to the general law and must be well-established before we can recognize it. There is an entry in the *wajib-ul-arz* of the village that "in this village a mistress treated as a wife and the child of a mistress shall also have a right to transfer property and to obtain and receive property." In regard to this, all that need be said is that it does not necessarily place illegitimate children on an equality with legitimate as heirs; and if that is the intention, it is ineffectual, as parties cannot by agreement alter the law of succession, and if this record be regarded as evidence of a custom, it is not conclusive. The few instances referred to by the Subordinate Judge in which illegitimate children may have succeeded are of doubtful authority, and would not go far to establish the custom contended for. The evidence that any such custom having the force of law exists is conflicting, and the fact that in the suit of 1872 the arbitrators disallowed Maharaj Singh's claim on the ground of illegitimacy, and Ajit Kuar never claimed the right for him at Dariso Singh's death, but permitted it to be postponed till after the death of his two wives, goes far to show that such a custom is not recognized. The decree of the lower Court should be set aside, and the appeal allowed, and the claim decreed with costs.

Appeal allowed.

CRIMINAL JURISDICTION.

1881

April 7.

Before Mr. Justice Oldfield.

IN THE MATTER OF THE PETITION OF RAM PRASAD v. DIRGPAL
AND OTHERS.

*Masters and Workmen—Breach of Contract on the part of workmen—
Act XIII of 1859—"Station."*

An employer of workmen residing and carrying on business in the city of Mirzapur, alleging that he had advanced money to certain workmen on the understanding that they would work for him and no one else until they had repaid such money, and that they had broken such contract by leaving his employment, made a complaint against such workmen under Act XIII of 1859, which had been extended to the "station" of Mirzapur by the Local Government. It appeared that such money was advanced by way of loan, and without any reference to the wages of such workmen or the payment for the work performed by them, and that no deduction on account of such advance was ever made from their wages or the payments made to them. *Held* that the contract between the parties was

something quite different from any contract contemplated by Act XIII of 1859, and that Act was therefore not applicable.

Held also that it was doubtful whether that Act applied locally, as it was not shown that the city of Mirzapur was comprised within the "station" of Mirzapur.

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ONE Ram Prasad, who resided and carried on business in the city of Mirzapur, employed certain persons as engravers on brass. He made a complaint to Mr. E. Galbraith, Magistrate of the first class, against such persons, under Act XIII of 1859, which had been extended to the "station" of Mirzapur by the Local Government by Notification in 1863. He alleged that he had advanced money to such persons on the agreement that they would work for him and no one else until they had repaid such money, and that they had broken such agreement. The Magistrate dismissed the complaint, holding that that Act was not applicable, inasmuch as the money which the complainant had advanced to such persons had not been advanced by him on account of any work which they had contracted to perform, within the meaning of that Act, but had been advanced by him merely by way of loan, with the intention of keeping such persons in his debt, and thereby preventing them from leaving his service. The complainant applied to the High Court to revise the Magistrate's order under s. 297 of Act X of 1872. The Magistrate of the Mirzapur district was called on by the High Court to report as to what comprised the "station" of Mirzapur under the Government Notification, and whether the complainant resided or carried on business within its limits. The Magistrate reported that it was doubtful as to what the "station" of Mirzapur comprised in 1863; but he presumed that the correct definition of "station" would be the city and suburbs of Mirzapur, i.e., all land within a radius of five miles from the *kotwali*; and that at the present time the station of Mirzapur was comprised within municipal limits, and the complainant resided within those limits.

Colvin and Kashi Prasad for the petitioner.

OLDFIELD, J.—The Magistrate, in my opinion, properly dismissed this complaint brought under Act XIII of 1859. The Act provides for the punishment of breaches of contract by artificers, workmen, and labourers who have received money in advance on account of work which they have contracted to perform; and by

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s. 2, if it shall be proved to the satisfaction of the Magistrate that such artificer, workman, or labourer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or refused to perform the same according to the terms of his contract, he shall be subject to the penalties provided by the section. There must be a contract for work, and the money must have been received in advance on account of the work to be performed. In this case it appears that the complainant employes workmen as engravers on brass; and he alleges that the accused received from him certain sums on the agreement that they would work for him, and for no other persons, until they had repaid the money, and that they have broken the contract by leaving his employment. It appears that the money was given them as a loan, and without any reference to the wages or payment for the work they performed, which was to be paid for at a certain rate, without any deduction on account of the money they had received, and as a matter of fact no deduction from the wages was ever made. The money they received, therefore, cannot be said to have been an advance made on account of any work contracted to be performed; it was not to be considered in the payment for any work. The contract was nothing more than for a loan of money, to which was attached a condition that the borrowers, in consideration of receiving the loan, should work for complainant and not transfer their services elsewhere until they repaid the money. This was something quite different from any contract which the Act contemplated. The effect of such a contract, if it could be enforced, might be to give complainant, by taking advantage of the necessities of his debtor, a right to his services as long as he lives, on his own terms as to wages and work, and it was never intended to make the breach of such a contract a penal offence. I may add that it is by no means clear that Act XIII of 1859 has application to the parties in this case. That Act has been extended to the station of Mirzapur, but the complainant is resident and carries on business in the town of Mirzapur, and it is not shown that the town is comprised within the station of Mirzapur, to which the Act was extended. The petition is rejected.

Application rejected.

CIVIL JURISDICTION.

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April 11.*Before Mr. Justice Oldfield and Mr. Justice Straight.*DEBI SINGH (DEFENDANT) *v.* HANUMAN UPADHYA (PLAINTIFF).**Jurisdiction of Small Cause Court—Compensation for personal injury—
Actual pecuniary damage—Act XI of 1865, ss. 6 (3), 12.*

The plaintiff in a suit for compensation for malicious prosecution claimed Rs. 200 as compensation for the mental annoyance caused him by such prosecution, and Rs. 25 the actual expense incurred by him in defending himself from the charge made against him. *Held*, with reference to s. 6 (3) and s. 12 of Act XI of 1865, that, the suit being one for the recovery of damages on account of an alleged personal injury, from which actual pecuniary damage had resulted, it was cognizable and should have been instituted in the Court of Small Causes having local jurisdiction. *Guaga Narain v. Gudadhur Chowdhry* (1) and *Brojo Soondur v. Eshan Chunder* (2) followed.

THE plaintiff in this suit stated in the plaint that on the 2nd April, 1880, the defendant falsely charged him and one Jageshar Singh with the theft of certain property, in consequence of which he and Jageshar Singh were arrested and kept in custody for ten days; that the said charge was preferred maliciously and without any reasonable or probable cause, by way of revenge, the plaintiff having been appointed to a post from which the defendant's cousin had been dismissed; that on inquiry the said charge was found to be false, and the plaintiff was acquitted on the 12th April, 1880; and that the result of the false charge preferred by the defendant against the plaintiff was that he, plaintiff, had to spend a large sum of money in defending himself, in addition to the mental annoyance and loss of reputation which it had caused him. The plaintiff claimed Rs. 225 damages, being Rs. 200 compensation for mental annoyance and loss of reputation, and Rs. 25 the costs incurred by him in defending himself in the Criminal Court. The suit was instituted in the Court of the Munsif of Benares. The Munsif gave the plaintiff a decree for Rs. 35, being Rs. 10 compensation for the mental annoyance and loss of reputation caused

* Application, No. 17B of 1881, for revision under s. 622 of Act X of 1877 of a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st December, 1880, affirming a decree of Babu Mrittonjoy Mukarji, Munsif of Benares, dated the 30th July, 1880.

(1) 13 W. R., 434. (2) 15 W. R., 179.

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to the plaintiff, and Rs. 25 the costs incurred by him in defending himself in the Criminal Court. On appeal by the defendant the lower appellate Court affirmed the Munsif's decree.

The defendant applied to the High Court to revise the decrees of the lower Courts under s. 622 of Act X of 1877, on the ground that the suit was not cognizable in the lower Courts, but in the Court of Small Causes at Benares, the claim being one for compensation for a personal injury from which actual pecuniary damages had resulted, and the demand being under Rs. 500.

Mr. *Spankie*, for the defendant, in support of the application, cited *Gunga Narain v. Gudadhur Chowdhry* (1) and *Brojo Soondur v. Eshan Chunder* (2).

Munshi Kashi Prasad for the defendant.

The judgment of the High Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is an application for revision under s. 622 of the Civil Procedure Code. The circumstances under which it is made are as follows:—

One Hanuman Upadhy brought a suit in the Court of the Munsif of Benares to recover damages for malicious prosecution; Rs. 200 in respect of the mental annoyance caused him, and Rs. 25, money actually out of pocket, for costs incurred by him in employing mukhtars in the Criminal Court to defend him. The Munsif decreed the claim, awarding damages under the first head at Rs. 10, and under the second giving the amount claimed in full. This decision the Judge of Benares in appeal upheld. The defendant Debi Singh now applies to this Court to set aside the whole of these proceedings on the ground that the plaintiff's suit was exclusively cognizable by the Small Cause Court, and that the Munsif had no jurisdiction to entertain it. The objection was not urged in either of the lower Courts, but being directly based upon the provisions of s. 622 of the Civil Procedure Code, we cannot refuse to take notice of it. We are of opinion that it is a well-founded one and must prevail, for it appears to us that

(1) 13 W. R., 434. (2) 15 W. R., 179.

having regard to the language of s. 6, sub-section (3), and s. 12 of Act XI of 1865, the plaintiff's suit should have been instituted in the Small Cause Court. By his plaint he in clear terms alleged and by distinct and positive evidence proved, actual pecuniary damage to the extent of Rs. 25, as the direct consequence of the wrongful act of the plaintiff. This claim therefore was in respect of a personal injury from which actual and ascertained pecuniary damage had resulted, and it clearly fell within the terms of s. 6, sub-section (3) of Act XI of 1865. He was therefore bound by the provisions of that Act to bring his suit in the Small Cause Court, which, the condition precedent to giving it jurisdiction under the head of "actual pecuniary damage" being satisfied, necessarily had the power to entertain and dispose of the general question of damage raised under the other head. This view has been expressed in two Calcutta rulings—*Gunga Narain v. Gudadhur Chowdhry* (1) and *Brojo Soondur v. Eshan Chunder* (2)—and in the opinions therein enunciated we coincide.

We must accordingly allow this application for revision and set aside all the proceedings hitherto had as having been held without jurisdiction. The plaint will be returned to the respondent, Hanuman Upadhyaya, in order that he may present it in the Small Cause Court. Each party will pay his own costs on this application.

Application allowed.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF UMRAO SINGH *v.* FAKIR
CHAND.

Magistrate of the District—Power to withdraw or refer cases—Act X of 1872 (Criminal Procedure Code), s. 47.

Magistrates of Districts should exercise the powers conferred on them by s. 47 of Act X of 1872 only when it is absolutely necessary for the interests of justice that they should do so; and when one of the parties to a case applies to have it withdrawn from the Magistrate inquiring into or trying it and referred to another Magistrate, the Magistrate of the District should give the other party notice of such application, and an opportunity of showing cause why such application should not be granted.

(1) 13 W. R., 434. (2) 15 W. R., 179.

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Where the accused in a criminal case applied to the Magistrate of the District, after the evidence of the complainant and his witnesses had been taken, to withdraw such case from the Subordinate Magistrate trying it and to try it himself, such application not containing any sufficient reason justifying the granting of the same, and the Magistrate of the District, without giving the complainant notice of such application or opportunity of showing cause against it, and without stating any reason, withdrew such case from the Subordinate Magistrate trying it and referred it to another for trial, the High Court set aside the order of the District Magistrate and of the Magistrate to whom such case was referred for trial, and directed the Magistrate from whom it had been withdrawn to proceed with it.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner, Umrao Singh, preferred a charge of mischief against one Fakir Chand before Maulvi Kadir Ali exercising the powers of a Magistrate of the first class in the district of Meerut: After the evidence of the complainant and his witnesses had been taken, and a date fixed for the examination of the witnesses for the accused, a petition on behalf of the accused was preferred to the Magistrate of the District, praying for the transfer of the case. This petition contained the following statements:—"That the case mentioned above is pending in the Court of Maulvi Kadir Ali, Deputy Collector: that Umrao Singh, the so-called complainant, is the husband's brother's son of Dakho, the wife of Ishq Lal: that the said lady is the real complainant, inasmuch as the house to which it is alleged mischief has been done belongs to her: that she has been for a long time on terms of enmity with the accused, and every day there is something to refer to the Court: that moreover that said lady is in affluent circumstances, and is always plotting to ruin the accused: that, as your honour knows well, owing to cases coming before you, the circumstances of this enmity, there is no other means of escape except by your tendering a helping hand: that the tahsildar, who went to make a local inquiry, was biased in favour of the complainant, and omitted to investigate facts which required investigation: petitioner now prays that you will transfer this case from that Court into your own and decide it yourself: that it is necessary that you should inspect the locality, so that you may learn all the facts: that if the case be not transferred, you will direct the said Maulvi not to pass final orders in this case merely on the tahsildar's report, without a local inquiry:

further that, as the counsel on both sides are Europeans, it would be proper for your honour to decide the case yourself." The Magistrate of the District, on the 19th November, 1880, made the following *ex-parte* order on this application:—"This case is transferred to" the Joint-Magistrate's "Court." On the 22nd November, 1880, the Joint-Magistrate dismissed the complaint, and referred the complainant to the Civil Court, remarking that the case "was manifestly one which ought never to have been entertained in a Criminal Court."

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The grounds upon which the complainant sought revision of the orders of the 19th and 22nd November, 1880, were, amongst others, (i) that the order of the 19th November was a wrong and improper exercise by the Magistrate of the District of his discretion and authority, regard being had to the grounds upon which the application for the transfer of the case was made, and to the circumstance that the Magistrate before whom the case was pending, who had recorded considerable evidence on the charge, was in no wise shown by that application to be unfit or incompetent to dispose of the charge, by passing a final order on the complaint as required by law; and (ii) that the order of the 22nd November was made directly in contravention of law, s. 147 of Act X of 1872, under which it was made, being applicable to cases in which the complaint is dismissed without evidence for the prosecution being recorded and witnesses for the defence being summoned.

Mr. Howard for the petitioner Umrao Singh.

Mr. Simeon for Fakir Chand.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

STRAIGHT, J.—I am of opinion that, in passing his order of the 19th November, 1880, the Magistrate unwisely and improperly exercised the discretion given him by s. 47 of the Criminal Procedure Code. The petition upon which it was based disclosed no adequate or satisfactory grounds for the removal of the case from the Deputy Magistrate, and to withdraw the matter from his cog-

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nizance upon such ridiculous grounds as those urged by Fakir Chand was to pass a reflection upon the judicial qualifications and impartiality of the Deputy Magistrate, for which I can find neither justification nor excuse. It is true that the powers given by s. 47 are very large, but for this very reason they should be most carefully exercised, and Magistrates of Districts should use the extensive discretion given them to divert the course of procedure from its ordinary channel, only when it is absolutely necessary for the interests of justice that they should do so. Moreover, when an application is made to the Magistrate of a District for the withdrawal or removal of a case from the Court of a Subordinate Magistrate by one of the parties to such case, notice of such application should be given to the opposite party, and an opportunity should be afforded him, if desirous of doing so, to show cause against its being granted. Nothing of this kind was done in the present instance; on the contrary, altogether ignoring any objections the complainant Umrao Singh might have had to urge, and without stating any grounds or reasons for his decision, the Magistrate, although the whole of the statements of the complainant and his witnesses had been taken and recorded by the Deputy Magistrate, summarily transferred the case to the Court of the Joint-Magistrate for disposal. It appears to me that, in taking this course, the Magistrate acted wholly without adequate or sufficient reason, if he accepted the grounds urged in the petition of Fakir Chand as justifying him in granting that person's application; and that if he did not act upon these, the least he could have done would have been to record the reasons that induced him to make his order at so late a stage of the Deputy Magistrate's proceeding. In considering the question of revision by this Court, I express no opinion, one way or the other, upon the merits of the charge of mischief instituted by Umrao Singh against Fakir Chand, and I simply confine myself to the points urged by the applicant upon the question of procedure. The orders of the Magistrate dated 19th November, 1880, and of the Joint-Magistrate of the 22nd November, 1880, will be set aside and the case will be restored to the file of the Deputy Magistrate, for him to proceed with the inquiry and pass such orders as may to him appear proper.

APPELLATE CIVIL.

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April 1.*Before Mr. Spankie and Mr. Justice Oldfield.*NAUBAT SINGH (DEFENDANT) *v.* KISHAN SINGH (PLAINTIFF).**Pre-emption—Allegation by plaintiff that a certain sum is the actual price—**Omission to allege readiness and willingness to pay actual price—Discretionary power of Court to grant decree.*

The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found that the plaintiff had such right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff the lower appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. *Held* that it was not necessary to interfere with the exercise of the lower appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of second appeal. *Durga Prasad v. Narwazish Ali* (1) distinguished.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of a share of a certain village, such right being founded on Muhammadan law, general usage, and the terms of the administration-paper of the village. It appeared that the property in suit had on the 14th September, 1864, been mortgaged, by way of conditional sale, to the defendant Naubat Singh to secure the repayment within six years of a sum of Rs. 700. The mortgagors, who retained possession of the property, stipulated in the instrument of mortgage that they should pay the mortgagee Rs. 105 annually from the profits of the property, that amount representing interest on the principal sum secured by the mortgage at the rate of Re. 1-4-0 per cent; that, in the event of default in payment of that amount annually or any part thereof, such amount should be regarded as principal and bear interest at the rate of Re. 1-4-0 per cent. per mensem; and that, if they failed to pay the amount of the mortgage-money in full at the end of the six years, the mortgage should be foreclosed. On the 9th November, 1871, the mortgagee, the defendant Naubat Singh, applied under

* Second Appeal, No. 1069 of 1880, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 19th July, 1880, reversing a decree of Munshi Piarey Lal, Munsif of Belari, dated the 27th February, 1880.

(1) I. L. R., 1 All., 591.

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Regulation XVII of 1806 for the foreclosure of the mortgage claiming a sum of Rs. 1,863-8-0. That sum represented the principal amount secured by the mortgage, Rs. 700, and interest computed according to the terms of the mortgage. In 1879, the mortgagors not having paid the amount claimed within the year of grace, the defendant Naubat Singh sued them for possession of the property. The mortgagors confessed judgment, and Naubat Singh obtained a decree for possession of the property, and obtained possession of it in execution of that decree on the 21st March, 1879. On the 7th January, 1880, the present suit was instituted against him and the mortgagors, in which the plaintiff preferred a right of pre-emption in respect of the property, claiming to take the same on payment of Rs. 700, the principal sum secured by the mortgage. The defendant Naubat Singh set up as a defence to the suit, *inter alia*, "that the property stood charged not only with the principal amount of the mortgage-money, but also for interest, and consequently the plaintiff's claim to enforce a right of pre-emption on payment of the principal only was not maintainable." The Court of first instance decided that the plaintiff had a right of pre-emption refused to allow him to exercise such right on the ground that the purchase-money was not, as alleged by him, represented by Rs. 700, the principal sum secured by the mortgage, but by Rs. 1,863-8-0, the sum, principal and interest, for which the mortgage had been foreclosed, and the plaintiff had only claimed the right on payment of the smaller sum, without expressing his willingness to pay any larger sum which might be found to be the purchase-money. On appeal by the plaintiff the lower appellate Court held, with reference to *Debi Parshad v. Abdul Ghani* (1), that inasmuch as the plaintiff's right of pre-emption had been established, the Court of first instance should have allowed him to exercise that right on payment of the sum found to be the price of the property notwithstanding that he had claimed the same for a smaller price; and it gave the plaintiff a decree conditional on the payment within three months from the date thereof of Rs. 1,863-8-0. The defendant Naubat Singh appealed to the High Court.

Pandits *Bishambar Nath* and *Nand Lal* for the appellant.

(1) N.-W. P. S. D. A. Rep., 1863, vol. i, p. 446.

Mr. Conlan and Shah *Asad Ali* for the respondent.

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The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows:—

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OLDFIELD, J.—The appellant urges that the lower Court should not have given a decree for the property by pre-emption conditional on plaintiff's paying the full amount required within a certain time, as he claimed the property on payment of a smaller sum and did not allege in his plaint that he was ready to pay a price which the Court might find to be payable, and we are referred to a decision of this Court,—*Durga Prasad v. Nawasish Ali* (1). There is this distinction between that case and the one before us that in the former the Court below had refused in its discretion to permit plaintiff to obtain the property by paying a larger sum than he had expressed himself in his plaint willing to pay, and the High Court observed that they could not hold as a matter of law that the Court below was bound to allow the plaintiff to amend his plaint and to bring in the very much larger sum which he should have offered to pay when he brought his suit. In this case the Judge has acceded to the prayer of the plaintiff, and it is not necessary that we should interfere with the exercise of his discretion in the matter, particularly as the objection was not taken in the written memorandum of appeal. The objections urged by the respondent are without force.

The appeal is dismissed but without costs.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

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April 19.

SURAJ DIN (PLAINTIFF) v. CHATTAR (DEFENDANT).*

Disposal of suit on preliminary point—Reversal by Appellate Court of decree on such point and irregular remand of case under s. 562 of Act X of 1877 (Civil Procedure Code) for trial of a certain issue—Power of succeeding Judge of Appellate Court to re-try such point.

A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court the then Judge of the

* Second Appeal, No. 1036 of 1880, from a decree of G. E. Knox, Esq., Judge of Randa, dated the 29th June, 1880, reversing a decree of H. M. Bird, Esq., Assistant Collector of the first class, Kirwi, dated the 13th May, 1880.

(1) I. L. R., 1 All., 591

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appellate Court, Mr. B, reversed the decree upon such preliminary point and remanded the suit under s. 562 of Act X of 1877 for the trial of a certain issue. The Court of first instance tried such issue and made a decree in accordance with its finding thereon. On appeal against the decree of the Court of first instance the defendant again raised such preliminary point. The then Judge of the appellate Court, Mr. K, dismissed the suit upon such preliminary point. Held that, as, although Mr. B had irregularly remanded the suit under s. 562 of Act X of 1877, his decision disposed of preliminary point and only left open for trial the issue which he had directed to be tried, Mr. K was not competent to re-try and decide such preliminary point.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case for the trial of the issue set out in the order of remand.

Babu Oprokash Chandar Mukarji for the appellant.

Munshi Hanuman Prasad for the respondent.

The High Court (SPANKIE, J., and OLDFIELD, J.) made the following order of remand:—

OLDFIELD, J.—The plaintiff brought this suit as ex-lambardar to recover rent for a certain holding from the defendant, Chattar, whom he alleges to be mortgagee of the original tenant, Patiya. The Assistant Collector in the first instance held that Chattar had nothing to do with the holding; that his father Kamta had taken it when relinquished by Patiya and held it as sir; plaintiff might, if so advised, sue him for profits; and he dismissed the suit. The Judge, Mr. Barstow, held that Chattar and Kamta were joint tenants of the holding, and Chattar was liable to plaintiff for the recorded rent, but could plead to set-off any sum due to him as share-holder for profits; and he reversed the decree of the Assistant Collector, and remanded the case under s. 562 of Act X of 1877 for the determination of the amount which should be deducted from the sum claimed by the plaintiff on account of profits due to the defendant and for re-decision. The Assistant Collector accordingly determined the amounts of profits to be set-off from the rent due, and decreed the balance. Chattar, defendant, appealed and the appeal was heard by Mr. Knox, Judge. One of the grounds of appeal was that defendant is not a tenant and liable for rent to plaintiff. The Judge held this contention to be correct, and on this ground reversed the decree of the Assistant Collector and

decreed the appeal. It is urged in appeal before us that the Judge Mr. Barstow's decision on the question of tenancy and liability for rent is final. This objection is valid. It was no doubt irregular for Mr. Barstow to remand the case for re-decision under s. 562, but his judgment disposed of the issue between the parties whether or not defendant Chattar was liable to pay rent to plaintiff on the holding, and it only left open for determination the amount of that rent after deduction of defendant's share of profits due to him by the plaintiff. It was not in Mr. Knox's power to re-open and decide again the question of liability for rent, nor can we say that Mr. Barstow's decision that Chattar and Kamta, although share-holders, took this land with liability to pay rent on it to the body of share-holders represented by the lambardar is wrong or open to any objection which may be entertained in second appeal. The case will go back in order that the Judge may determine whether the amount now decreed by the Assistant Collector is correct. Ten days will be allowed for objections and a day be fixed for hearing by the Registrar.

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Issue remitted.

Before Mr. Justice Oldfield and Mr. Justice Straight.

MAINATH KUARI (JUDGMENT-DEBTOR) v. DEBI BAKHSH RAI
(DECREE-HOLDER).*

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April 20.

Execution of decree—Limitation—Application by decree-holder for postponement of sale—Application for execution, or to take some step in aid of execution of decree—Act XV of 1877 (Limitation Act), sch. ii, No. 179.

An application by a decree-holder for the postponement of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time is not "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of No. 179, sch. ii, Act XV of 1877, and limitation cannot be computed from the date of such an application.

THE decree-holder in this case applied for execution of his decree on the 19th July, 1876. In pursuance of this application certain property belonging to the judgment-debtor was attached and was notified to be sold on the 21st August, 1876. On the day fixed for the sale to take place the decree-holder applied to

* Second Appeal, No. 7 of 1881, from an order of W. Kaye, Esq., Judge of Gorakhpur, dated the 10th November, 1880, reversing an order of Maulvi Muhammad Kamil, Munsif of Basti, dated the 14th April, 1880.

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the Court executing the decree to postpone the sale, stating that he had agreed with the judgment-debtor to give him time to raise the amount of the decree. This application was granted, and the execution-case was struck off the file. On the 21st August, 1879, the decree-holder made the next, the present, application for execution of his decree. The Court of first instance held that the application was barred by limitation. On appeal by the decree-holder the lower appellate Court held that the application was within time, having been made within three years from the date of the decree-holder's application of the 21st August, 1876, which the lower appellate Court held was an application in aid of execution within the meaning of No. 179, sch. ii. of Act XV of 1877. The judgment-debtor appealed to the High Court, contending that the decree-holder's application of the 21st August, 1876, was not one in aid of execution, and consequently limitation could not be computed from the date of that application, and the present application was barred by limitation.

Munshi Sukh Ram and Maulvi Mehdi Hasan for the appellant.

Mir Zahur Husain and Babu Sital Prasad Chattarji for the respondent.

The judgment of the Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

OLDFIELD, J.—The application of the 21st August, 1876, was an application by the decree-holder that the sale fixed for that day might be postponed as he had given the judgment-debtor time. This cannot be held to be "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of No. 179, sch. ii. Act XV of 1877. It was an application made with the object of staying execution, and it has been held by this Court that an application of this nature is not an application to enforce or keep in force the decree, within the meaning of art 167, sch. ii, Act IX of 1871.—*Fakir Muhammad v. Ghulam Husain* (1). The order of the Judge is set aside, and that of the Munsif is restored, and this appeal is decreed with costs.

Appeal allowed.

*Before Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and
Mr. Justice Straight.*

1881
April 21.

DULARI (JUDGMENT-DEBTOR) v. MOHAN SINGH (AUCTION-PURCHASER).*

Sale in execution of decree—Death of decree-holder before sale—Effect on validity of sale—Act X of 1877 (Civil Procedure Code), ss. 365, 366.

A judgment-debtor applied that an execution-sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside, and disallowed such application, and made an order confirming such sale.

Held per PEARSON, J., that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside.

Per SPANKIE, J., that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 365 and 366 of Act X of 1877, as the Court executing the decree should have proceeded under those sections.

Per OLDFIELD, J., and *STRAIGHT, J.*, that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 365 and 366 of Act X of 1877 could not be adapted to execute proceedings, As such sale had been published and conducted according to law, it had properly been confirmed.

CERTAIN immoveable property belonging to the judgment-debtor in this case was attached, and was ordered to be sold on the 14th August, 1880, and it was put up for sale on that day, and was purchased by one Mohan Singh. In the interval between the day on which such property was ordered to be sold and the day on which it was sold the decree-holder died. Before the order confirming the sale was made the pleader for the decree-holder informed the Court executing the decree of the decree-holder's death. The judgment-debtor objected to the confirmation of the sale on the ground that all the proceedings which took place after the decree-holder's death were invalid. The Court executing the decree disallowed this objection and made an order confirming the sale. The parties who appeared at the hearing of this objection were the judgment-debtor

* First appeal, No. 166 of 1880, from an order of Maulvi Kamal-ud-din Ahmad, Munsif of Sambhal, in the district of Moradabad, dated the 16th September, 1880.

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and the purchaser Mohan Singh; the legal representatives of the decree-holder were not called on to appear and did not appear. The judgment-debtor appealed to the High Court from the order confirming the sale. On her behalf it was again contended that the sale was invalid, inasmuch as it had taken place after the decree-holder's death, and without the legal representatives of the decree-holder being made parties to the execution-proceedings.

Babu *Lal Chand* for the appellant.

Lala Latta Prasad for the respondent (purchaser).

The Judges of the Division Bench (PEARSON, J., and SPANKIE, J.) before which the appeal came for hearing, differing in opinion, delivered the following judgments:—

SPANKIE, J.—An application on behalf of the decree-holder was presented to the Munsif on the 22nd January, 1880, by her pleader, and after attachment and fulfilment of the requirements of the law the sale was made of a *dalan* with side rooms on the 14th August, 1880, through the nazir of the Court. The property was purchased by Mohan Singh for Rs. 50, who deposited the purchase-money in due course. On the 18th August four days after the sale, the judgment-debtor presented a petition to the effect that the decree-holder had died, and the name of her heir had not been substituted on the record; that the sum due under the decree was Rs. 21-4-0, and only so much of the property should have been sold as would have satisfied the decree; and that the sale after the death of the decree-holder was void, being illegal. The plaintiff's pleader represented that the decree-holder had died, and he had reported the fact to the Court. The date of his report by petition was 10th September, 1880, six days before the order of the Court now appealed. The Munsif admits that the auction-sale occurred after the death of the decree-holder, and observes that the Court was informed of her decease after the sale, but there was no reason why the sale should not be confirmed. He therefore confirmed it in favour of the auction-purchaser, but only to the extent of half the *dalan* and one side room, and for Rs. 25, returning the balance of the purchase-money to the auction-purchaser, and directing that the heirs of the deceased decree-holder should receive the

amount due under the decree, and the balance be paid to the defendant. It is urged in appeal that, as the decree-holder died before the auction-sale, and the name of her legal representative was not substituted on the record, all the proceedings that were had after her death were null and void, and the auction-sale of the 14th August, 1860, ought to be set aside. I am not prepared to say that the proceedings in execution of a decree might not abate in the case of a sole decree-holder who dies during such proceedings, and where no application by the legal representative of the deceased is made to have his name substituted in the place of the deceased. S. 647 of the Code provides that the procedure prescribed in the Code up to that section shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction other than suits and appeals. There is in the present Code a different arrangement of Part II, Chapter XXI, or incidental proceedings relating to the death, marriage and insolvency of parties. This chapter follows the chapters which deal with a suit from its inception to its execution inclusive. This was not so with regard to the subject in Act VIII of 1859 which the present Code supersedes. This Chapter on the death, &c., of parties was introduced in Act VIII of 1859 in quite a different position, *i.e.*, prior even to the examination of parties and documents, and prior to the first hearing, so that it might seem to have application only to suits strictly whilst pending before decree. Whereas as remarked above the chapter is now so placed after chapter XVII on judgment and decree, chapter XVIII which relates to costs of applications, chapter XIX on execution of decrees, and chapter XX on insolvent judgment-debtors. This being so, it may be reasonably argued that the Legislature, by making this distinction between the old and the new Code, meant to extend the procedure under chapter XXI to all those cases in which a suit was still before the Courts in one of its stages from inception to final process. Moreover, if it were otherwise and we had to fall back upon s. 647 of the Code, it is sufficient to say that the procedure relating to the death of parties can be made applicable without any difficulty to proceedings in execution, and therefore the requirements, if that section were applied in this case, would be fulfilled. In following this view I differ from the ruling in *Gulab Dass v.*

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Lakshman Narhar (1), though I admit that there is force in the argument that before execution can be had at all a right must have been fully established and delay afterwards is merely indulgence to the judgment-debtor. But then it must be allowed that the Court cannot proceed to take steps in execution unless it is moved to do so, and if the decree-holder dies, and no one appears in his place who can be regarded as his legal representative, the proceedings in execution are naturally suspended. In order then to get rid of this inconvenience, it is desirable that the Court should have some well defined mode of procedure, and this it finds in chapter XXI of the Code or in s. 647, and either way s. 365 might apply to this case, inasmuch as the right to sue, i.e., to take out execution under the decree, already exists, and does not die with the decree-holder, but survives in favour of his legal representative. But if s. 365 of the Code applies to this case, and no application referred to in that section has been made, we must pass on to see what is to be done. In s. 366, where no such application has been made, we find that the Court may pass an order that the suit shall abate, and award to the defendant the costs which he has incurred in defending the suit, to be recovered from the estate of the deceased plaintiff, or it may pass such other order as it thinks fit for bringing in the legal representative of the deceased, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both these purposes. Here then, if the procedure in cases of death of a sole plaintiff be applicable to the case now before us, which I hold it is to be, is a procedure which meets the difficulty and is certainly applicable in all respects. The lower Court cannot be said to have exercised any discretion under this section. The question as to the abatement of the execution-proceedings does not appear to have been present to the Munsif's mind. He saw no reason why the sale should be void because the decree-holder was dead, and so far as he considers the sale was not necessarily void, which is the contention of appellant, I agree with him. The sale as a sale is free from objection. It was made in accordance with the prayer of the deceased decree-holder and must be regarded as having been made by the Court at his instance. The sale is a fact, and having been

(1) I. L. R., 3 Bom., 221.

ordered and made on the formal application of the decree-holder, it is not necessarily bad because he died before it occurred. But a sale of immoveable property cannot become absolute in execution of a decree until it has been confirmed by the Court, and when it is confirmed it is so confirmed as regards the parties to the suit and the purchaser. It is clear that, if the decree-holder be dead when the sale is confirmed by order, it is only confirmed as regards one of the parties, the judgment-debtor, and the auction-purchaser. This being so, it seems to me that the lower Court's order in confirming the sale is improper and cannot be maintained. It should have dealt with the death of the decree-holder either under s. 365 or 366 of the Code as the circumstances of the case required. But the confirmation of the sale would be in abeyance until it had exercised the large discretion allowed by the section, yet the sale made at the instance and on the application of the decree-holder when living would not be voided by his death. I would so far decree the appeal as to reverse the order as it stands and remand the case to the Munsif to comply with the requirements of the law.

PEARSON, J.—I apprehend that the ground of appeal is valid and must be allowed. There can be no doubt that a suit will abate on the death of a sole plaintiff if not prosecuted by his legal representative; and I cannot see why an application for execution for the execution of a decree should not abate in like manner on the decease of the decree-holder if not prosecuted by his legal representative. The action of a Court necessarily comes to an end when the party which set it in motion ceases to move it, and no one entitled to take his place continues the movement. The right to bring the property to sale had passed away from the decree-holder on whose application the sale was ordered before the sale was made. Under the circumstances the sale of the property of the judgment-debtor was improper and is invalid, and I would reverse the order of the lower Court and decree the appeal with costs.

My honourable colleague is of opinion, if I rightly understand, that, although the order confirming the sale is bad, the sale is good and may be confirmed after making the legal representative of the deceased decree-holder a party to the proceedings. There would thus appear to be a difference of opinion between us on a point

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of law, viz., the validity of the sale; and I therefore conceive it to be necessary for the proper disposal of the appeal that it be referred to one or more of the other Judges of the Court under the provisions of s. 575 of the Procedure Code.

The appeal accordingly was laid before OLDFIELD, J., and STRAIGHT, J., by whom the following judgments were delivered:

OLDFIELD, J.—It appears that the sale was made on the 14th August, 1880, at the instance of the judgment-creditor and after the requirements of the law had been fulfilled. Before, however, the sale had been held the judgment-creditor died, and on the 18th August the judgment-debtor objected to the confirmation of the sale on the ground that the sale after the death of the decree-holder was void, being illegal. This objection to the confirmation of the sale is certainly not one which can be entertained under s. 311, Civil Procedure Code, nor do I consider that the death of the judgment-creditor prior to the sale taking place, but after all the requirements of the law had been fulfilled, can otherwise afford sufficient ground for setting aside the sale. The proceedings cannot I think be held to have abated under the provisions of ss. 365 and 366 of the Civil Procedure Code. S. 647, Civil Procedure Code, is to the effect that the procedure prescribed in the Civil Procedure Code shall be followed as far as it can be made applicable in miscellaneous proceedings; but I do not think ss. 365 and 366 can be made applicable to a proceeding in execution of a decree when the sole judgment-creditor dies, so as to cause abatement of the proceedings, if within the time limited by law no application has been made by the legal representative of the deceased to have his name entered in the record in place of the deceased, for I do not find that the Limitation Act provides a limitation in such a case. The only law to which we can be referred is art. 171, sch. ii of the Limitation Act, but that deals with applications by persons under ss. 363 and 365 to be the legal representatives of a deceased plaintiff or appellant, and obviously refers to parties who are plaintiffs in a suit or appellants in an appeal. I concur in the view expressed in *Gulab Das v. Lakshman Narhar* (1).

(1) I. L. R., 3 Bom., 221.

There does not appear to be any provision in the Procedure Code for abatement of proceedings in execution of decrees like suits. Under s. 232 application for execution can be made by a legal representative of a deceased judgment-creditor, and there is nothing to prevent their being made at any time within the period of limitation prescribed by art 179. When it is brought to the notice of the Court that the judgment-creditor is dead and no legal representative appears, the proper course would be to strike off the proceeding by default, leaving the legal representative to make a fresh application for execution. In the case before us the Court was unaware of the death of the judgment-creditor, and the order for sale, which had been properly made before his death, was carried out by the sale of the judgment-debtor's property, notwithstanding his death. The death of the decree-holder after execution taken out will not affect the validity of the sale which had been made on the authority of the Court's order which is unaffected by the decree-holder's death. By English practice, "if the plaintiff die after final judgment his executors must revive it against the defendant before they can have execution, or if the defendant die after final judgment it must be revived against his executors or against his heirs and terre-tenants, but if the plaintiff die after a *fi. fa.* sued out, inasmuch as the sheriff derives authority from the writ, it may be executed notwithstanding."—Smith's Action at Law, 9th ed., p. 300. So here, the authority for the sale remained, and the validity of the sale is unaffected. I see no material objection to the confirmation of the sale with reference to s. 312, Civil Procedure Code. I would dismiss the appeal with costs.

STRAIGHT, J.—I do not think that the death of the decree-holder prior to the execution-sale rendered such sale void. It seems to have been published and conducted in accordance with the provisions of the law; and was therefore not open to any objection under s. 311 of the Procedure Code. At the time the decree-holder died she had satisfied all the preliminaries necessary to entitle her to the sale of her judgment-debtor's property, and all that remained to be done was for the order of the Court directing the sale to be carried out. It does not appear to me that the provisions of ss. 365-366 can be adapted to execution-proceedings, but I so far concur with Mr. Justice Spankie that I think it would

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have been better had the Court executing the decree made the representatives of the deceased decree-holder parties on the hearing of the application for confirmation of sale. At the same time the not doing so seems scarcely sufficient ground for disturbing the order of the Munsif, and I therefore concur with Mr. Justice Oldfield that the appeal should be dismissed and the order confirming the sale upheld.

Appeal dismissed.

Before Sir Robert Stuart, Kt, Chief Justice, and Mr. Justice Oldfield.

NAGAR MAL (PLAINTIFF) v. MACPHERSON (DEFENDANT).*

Return of plaint to be presented to the proper Court—Rejection of plaint—Cause of action—Jurisdiction.

1881
M y 2.

The plaintiff in this suit claimed in a Civil Court (1) a declaration of his right to certain land; (ii) that certain leases of such land, so far as their terms exceeded the term of settlement, should be cancelled; and (iii) arrears of rent for such land. The Court held as regards claim (i) that the plaint did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right; as regards claim (ii) that, with reference to the terms of s. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen; and as regards claim (iii) that it was cognizable in a Court of Revenue; and it directed that under s. 57 of Act X of 1877 the plaint should be returned to the plaintiff to be presented to the Revenue Court. *Held* that under the circumstances the plaint should have been rejected and not returned.

THE plaintiff in this suit, which was instituted in the Court of the Subordinate Judge of Dehra Dún, claimed (i) a declaration of his right as proprietor to certain land; (ii) the cancelment of certain leases of such land in so far as the terms of such leases exceeded the term of the settlement of such land; and (ii) Rs. 812-5-6, principal and interest, being the rent due for such land from the 1st July, 1876, to the 30th June, 1879. The plaintiff represented the persons who had originally leased such land, and the defendant represented the persons to whom such land had originally been leased. The Subordinate Judge held that as regards the claim for a declaration of the plaintiff's proprietary right and the claim for the cancelment of the leases, the plaint disclosed no cause of action; inasmuch as it was not alleged that the defendant had denied or

* First Appeal, No. 132 of 1880. from an order of F. H. Fisher, Esq., Judge of the Court of Small Causes at Dehra Dún exercising the powers of a Subordinate Judge, dated the 9th August, 1880.

was interested in denying the plaintiff's title; and inasmuch as s. 29 of Act XVIII of 1873, which made a lease for a period exceeding the term of settlement voidable, expressly deferred the period when the cause of action should arise to the expiration of the term of settlement. As regards the claim for arrears of rent, the Subordinate Judge held that a cause of action was disclosed in the plaint, but that such claim was not one of which a Civil Court could take cognizance. The Subordinate Judge accordingly made the following order:—"I return the plaint to the plaintiff to be presented to the proper Court (*i.e.*, Revenue Court having jurisdiction) under s. 57 of Act X of 1877." The plaintiff appealed to the High Court, framing the appeal as one from an order.

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Munshi *Hanuman Prasad* for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) for the respondent.

The following judgments were delivered by the Court:—

STUART, C.J.—In this case the plaintiff appealed from an order by the Judge of the Court of Small Causes at Dehra Dún exercising the powers of a Subordinate Judge by which he returned the plaint to the plaintiff to be presented to the proper Court, that is, to a Revenue Court having jurisdiction. The plaint sets out the plaintiff's title and the sale to the defendant of the rights and interests of a previous lessee, and it prays for a declaration of the plaintiff's right, for the setting aside of certain leases, and thirdly for recovery of certain arrears of rent or "lease-money" as it is called in the plaint with costs and interest. The defendant's written statement traversed these claims, pleading that the plaintiff was not entitled to any declaratory decree; that, as regards the cancelling of the leases, no cause of action had arisen or could have arisen under s. 29 of the Rent Act XVIII of 1873 till the expiration of the term of the settlement; and that with respect to the rent claimed the Civil Court could not entertain the suit, as a suit for rent could only be heard in a Revenue Court under s. 93 of the same Rent Act. After hearing the pleaders for the respective parties the Subordinate Judge made an order by which he found that no cause of action was disclosed in the plaint so far as regards the prayer for a

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declaration of the plaintiff's right and for the cancelment of the leases, and so far the Subordinate Judge in my opinion is right. A declaration of the plaintiff's right was altogether uncalled for, for his title is not only not denied or in any way disputed by the defendant, but the defendant could not possibly call in question the plaintiff's title without imperilling his own, seeing that as lessee the defendant derives his right from the plaintiff's predecessors and in whose shoes he the plaintiff stands. To deny the plaintiff's right and title therefore would be tantamount to a disclaimer of his own right as lessee. And then in regard to the cancelment of the leases I may remark, although this is strictly speaking a question for a Revenue Court, that s. 29 of the Rent Act XVIII of 1873 is conclusive, for it is there enacted:—"If any lease be granted, or if any agreement be entered into, by any land-holder under engagement with Government for his land, fixing the rent of land for any period exceeding the term of such engagement, such lease or agreement shall, on the expiration of the term aforesaid, be void at the option of either party." And meanwhile therefore no cause of action can arise in regard to these leases. But by the same order the Subordinate Judge also found that a cause of action for arrears of rent was disclosed in the plaint, but that it appears to be one not within the cognizance of a Civil Court, and the order ended thus:—"I return the plaint to the plaintiff to be presented to the proper Court (*i.e.*, Revenue Court having jurisdiction) under s. 57 of Act X of 1877." Now on both these last points the Subordinate Judge, in my opinion, is wrong, for in regard to the arrears of rent there is no statement in the plaint that the defendant has refused to pay them or has denied the right of the plaint to receive them. All that the plaint states on this subject being that the defendant had not since the date of the plaintiff's acquisition of the property by purchase paid rent to him. The last part of the order I have quoted as to returning the plaint to the plaintiff is clearly erroneous, seeing that the effect of the Judge's finding is that the plaintiff has shown no sufficient cause of action and that the plaint was substantially insufficient. Under these circumstances, the plaint should have been rejected altogether, the plaintiff of course being left to any further remedy he might have, although it was unnecessary to

specify that in the order. The plaint could not be returned to the plaintiff to be presented to another Court seeing there was no other Court which could accept it in its entirety, and could only be entertained as a whole or not at all. On these two last points therefore the Subordinate Judge's order must be corrected. The defendant having been thus successful on all the points considered in the Subordinate Judge's order, the present appeal must be disallowed and the suit as brought dismissed with costs in both Courts.

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I wish to add that in my opinion the present appeal has been erroneously entitled as an appeal from an order. No doubt there was an order to return the plaint and present it in another Court, but the order to the effect was erroneous, seeing that the finding that the plaint disclosed no cause of action went to the root of the case on its merits, necessitating its dismissal. The defendant's plea which has thus been successful exactly corresponds to what is called in English pleading a *demurrer*, the meaning of which simply is that, assuming all the statements in the plaint to be true, they yet show no cause of action, and the defendant therefore cannot be called on to plead over, and such a plea when successful, as in the present case, is not merely of a preliminary or formal nature, but a plea on the merits going to the root of the whole case in fact and in law and necessarily therefore involving the dismissal of the whole suit as brought.

OLDFIELD, J.—There are three kinds of reliefs sought by the plaintiff, viz., (i) that his right be declared to a four biswas, nine biswansis, four and a half kaohwansis share in mauza Niranjanpur; (ii) that certain leases so far as they exceed the term of the settlement be set aside, and plaintiffs be put in possession of the property leased after the expiry of the settlement; (iii) that certain arrears of rent due under the leases be awarded.

In regard to the first, the plaint discloses no cause of action against the defendant. There is nothing to show that he has disputed the plaintiff's title. The second part of the claim has reference to s. 29, Act XVIII of 1873, which declares that a lease granted for any period exceeding the term of the settlement shall on the expiration of the term of the settlement be void at the

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option of either party. This part of the claim of plaintiff has been brought prematurely; and the claim for arrears of rent is not cognizable in a Civil Court. The plaint should have been rejected; and I concur with the Chief Justice that the order of the lower Court should so far be corrected, by directing that the plaint be rejected with costs. The appeal is dismissed with costs.

Appeal dismissed.

1881
 May 3.

Before Mr. Justice Spankie and Mr. Justice Straight.

HAZARI RAM (PLAINTIFF) v. SHANKAR DIAL (DEFENDANT).*

Mortgage—Conditional sale—Pre-emption—Cause of action.

The cause of action of a person claiming a right of pre-emption in respect of a mortgage by way of conditional sale arises on foreclosure of such mortgage, that is to say, on the expiration of the year of grace without payment by the mortgagor of the mortgage-money, inasmuch as on the expiration of such period the mortgagee acquires a proprietary title to the mortgaged property. Such person can therefore sue to enforce his right of pre-emption on the expiration of such period, and need not wait to do so until the mortgagee has obtained proprietary possession of the mortgaged property.

THE plaintiff in this claimed to enforce a right of pre-emption in respect of a share of a certain village, such right being founded on the terms of the village administration-paper. This share had been mortgaged, by way of conditional sale, by its proprietor to the defendant Shankar Dial. The latter applied for foreclosure of the mortgage on the 14th July, 1877. The notice required by Regulation XVII of 1806 was issued on the 30th July, 1877, and was served on the mortgagor on the 4th August, 1877. After the expiration of the year of grace the defendant Shankar Dial sued the mortgagor for possession of the share, and obtained a decree, in execution of which he obtained possession of the share on the 20th September 1878. In the meantime, on the 7th August, 1878, the present suit to enforce a right of pre-emption in respect of the share was instituted by the plaintiff. The defendant, Shankar Dial, set up as a defence to the suit that it had been instituted before the plaintiff had acquired a right to sue, and it was therefore not maintainable,

* Second Appeal, No. 444 of 1880, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 18th February, 1880, reversing a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Gházipur, dated the 30th September, 1879.

contending that the plaintiff acquired a right to sue, not on the expiration of the year of grace, but when he (the defendant) obtained possession of the share, inasmuch as when he obtained possession of the share his title thereto became absolute and not before. The Court of first instance decided that the plaintiff acquired the right to sue on the expiration of the year of grace, and the suit had not been instituted prematurely, holding that the defendant's title to the share became absolute on the expiration of the year of grace. On appeal by the defendant the lower appellate Court held that the defendant's title did not become absolute until he had obtained a decree for possession of the share and obtained possession thereof, and until that time the plaintiff had no right to sue, and the suit was therefore prematurely brought; and it dismissed the suit. The plaintiff appealed to the High Court, contending that he acquired a right to sue on the expiration of the year of grace.

Mr. Conlan, Pandit *Ajudhia Nath*, and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. Colvin, Munshis *Hanuman Prasad* and *Sukh Ram*, and Pandit *Bishambhar Nath* for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.), so far as it is material for the purpose of this report, was as follows:

SPANKIE, J. (STRAIGHT, J. concurring).—The Judge considered before the other pleas the objection contained in the sixth plea that according to art. 10, sch. ii of Act XV of 1877, the cause of action in a pre-emption suit arises on the date of the delivery of actual possession: the defendant got proprietary possession on the 20th September, 1878, and therefore no cause of action had accrued to the plaintiff on the 7th August, 1878, when the suit was instituted. The lower appellate Court observes that on this plea two questions arose, (i) when did the conditional sale become absolute; (ii) when did the plaintiff's cause of action arise. Application for foreclosure was made on the 14th July, 1877. Notice was issued to the conditional vendor on the 30th July, 1877, but service was not effected until the 4th August, 1877. The year of grace ran from that date and expired on the 3rd August, 1878. The defendant was obliged to bring a regular suit for possession. He obtained

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a decree and was put into possession by the Court on the 20th September, 1878. On the authority of the decision of the Privy Council in *Forbes v. Ameeroonissa Begum* (1) the Judge held that the mortgagee's title was not complete at the end of the year of grace, but he had to bring a regular suit for possession, if out of possession, or to obtain a declaration of his title, if in possession. The title of the defendant therefore was not complete until the 20th September, 1878. Art. 10, sch. ii, provides a period of one year from the time when the purchaser takes physical possession of the whole property sold. The defendant could not give this physical possession until the 20th September, 1878, when he got it himself. The Judge therefore held the suit to be premature, and dismissed it, decreeing the appeal.

It is now contended in second appeal that the ruling of the lower appellate Court is erroneous, as the purchaser's title becomes complete on the expiration of the year of grace. The vendee may be obliged to sue his vendor for possession of the property, but he is not required to sue for the completion of his title. The lower appellate Court appears to be wrong in considering that the suit is premature. It is right in saying that the year of grace expired at the close of one year from the date of service. In the decision of the Privy Council cited by the Judge—*Norender Narain Singh v. Dwarka Lal Mundur* (2) their Lordships adopt the decision of the Full Bench of the High Court of Bengal in *Mohesh Chunder Sein v. Tarinee* (3) on the point. But the lower appellate Court has not shown satisfactory grounds for holding that the suit was premature, and must therefore be dismissed, because physical possession was not given until the 20th September following the 3rd of August the date of the expiration of the year of grace. The right of the mortgagor was gone, and the title of the mortgagee as owner was acquired. The Judge has misapprehended the decision of the Privy Council in the case of *Forbes v. Ameeroonissa Begum* (1). The proceedings under the Regulation in regard to these mortgages are purely ministerial, it is true, and the mortgagee is left to a regular suit, if out of possession, to recover possession, or to obtain a declaration of his absolute title if he is in pos-

(1) 10 Moo. A., 340.

(2) I. L. R., Calc. 397.

(3) W. R., F. B., 27. S. C., 1 B. L.

B., F. B., 14.

session. When such a suit is brought the mortgagor may contest the validity of the conditional sale, the regularity of the foreclosure proceedings, and may show that nothing was due. But the issue will be, so far as the right of redemption is affected, whether at the end of the year of grace anything was due to the mortgagee, and if so, whether the necessary deposit had been made. If the mortgagor fails to establish this case, the right of redemption is gone. But a decree in favour of the mortgagee does not create his title as owner. It establishes as a matter beyond all further question that as between the mortgagor and mortgagee the ownership has passed absolutely from the former to the latter. But the title of the mortgagee was created by the failure of the mortgagor to redeem within the year of grace, and dates from the end of that year. In this case the mortgagee acquired his title as owner on the 3rd August, 1878, on which day the right of redemption was gone, and the plaintiff was in a position to bring a suit from the day that the title as owner was vested in the mortgagee. It was not necessary that he should wait until the mortgagee obtained physical possession. But if he had waited until that had happened, then by the law of limitation he was bound to sue within one year from the date on which the mortgagee acquired such physical possession. Under this view of the case the Judge should have disposed of the case on its merits. We therefore decree the appeal, reverse his decree, and remand the appeal to his Court in order that he may do so; costs of this appeal will abide the result.

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Cause remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Spankie.

EMPRESS OF INDIA v. RAM DAYAL.

1881

*Previous conviction—Attempt to commit offence—Act XLV of 1860
(Penal Code), ss. 75, 457, 511.*

May 6.

A person, having been convicted of an offence punishable under s. 457 (Ch. XVII) of the Indian Penal Code, was subsequently guilty of an attempt to commit such an offence. *Held* that the provisions of s. 75 of the Indian Penal Code were not applicable to such person.

THIS was an appeal from a conviction on a trial held by Mr. H. D. Willock, Sessions Judge of Azamgarh, dated the 21st

1881 January, 1881. The appellant was convicted by the Sessions Judge of attempting to commit house-breaking by night with intent to commit theft. He was sentenced by the Sessions Judge to the enhanced punishment of transportation for fourteen years, with reference to the provisions of ss. 511, 457, and 75 of the Indian Penal Code, and to the fact that he had been previously convicted of an offence under s. 457 (Ch. XVII) of the Code.

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Mr. Niblett, for the appellant, contended that the provisions of s. 75 of the Code were not applicable in this case, the offence of which the appellant had been convicted not being one punishable under chapter XVII of the Code.

The *Junior Government Pleader* (Babu Dwarka Nuth Banarji) for the Crown.

SPANKIE, J.—There is no doubt of the guilt of the prisoner upon the evidence on the record. But the offence of which the prisoner was convicted is one punishable under ss. 511 and 457. On the 12th March, 1873, the prisoner was convicted of an offence punishable under Chapter XVII of the Penal Code, s. 457, and a previous conviction is said to have been proved then against him. The prisoner states that he was whipped the year before for being in possession of spurious coin. But the date and nature of the offence is not known; under the offence punishable under s. 457 he was sentenced to four years' rigorous imprisonment. This previous conviction and sentence was taken into consideration in the present trial, and under ss. 511, 457 and s. 75 the prisoner was sentenced to fourteen years' transportation. But an attempt to commit an offence punishable under s. 511 is an offence under s. 40 of the Penal Code. It is not an offence punishable under Chapter XVII of the Code. It is an offence punishable under s. 511 of the Code; s. 75 therefore cannot apply to this case. The offence of which the prisoner has now been convicted is an attempt at house-breaking by night with intent to commit theft, and the longest term of imprisonment for the substantial offence is fourteen years, and the punishment provided by s. 511 is half that term of imprisonment. I am therefore under the necessity of modifying the sentence passed by the Sessions Judge, and I therefore sentence the prisoner to seven years' rigorous imprisonment.

APPELLATE CIVIL.

1881
May 9.*Before Mr. Justice Straight and Mr. Justice Tyrrell.*RAM NANDAN RAI (JUDGMENT-DEBTOR) v. LAL DHAR RAI
(DECREE-HOLDER).**Decree for payment of money "in accordance with written statement"—
Construction of decree—Interest.*

A decree for money directed that its amount should be payable "according to the terms of the judgment-debtor's written statement." In his written statement the judgment-debtor had promised to pay interest on the judgment-debt if the same were not discharged by a certain day. *Held*, having regard to the decision of the Full Bench in *Debi Charan v. Pirbhu Din* (1) that the judgment-debtor having failed to discharge the judgment-debt by such day, he was bound by the terms of the decree to pay interest on its amount.

THE judgment-debtor in this case applied for the refund of interest on the amount of the decree, which he alleged the decree-holder had unduly recovered in execution of the decree, inasmuch as the decree did not direct that interest should be payable on its amount. The decree directed that its amount should be paid "according to the terms" of the judgment-debtor's "written statement" in the suit in which the decree was made. In that written statement the judgment-debtor had, amongst other things, promised to pay interest on the judgment-debt, if it were not discharged by a particular day. The Court executing the decree disallowed the application, and its order was affirmed by the lower appellate Court on appeal by the judgment-debtor. The judgment-debtor thereupon appealed to the High Court.

The *Senior Government Pleader* (Lala Juala Prasad) for the appellant.

Lala Lalla Prasad for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—Having regard to the decision of the Full Bench in *Debi Charan v. Pirbhu Din* (1), we think that the view taken by the lower Courts must be upheld. The decretal order

* Second Appeal, No. 76 of 1880, from an order of J. W. Power, Esq., Judge of Ghazipur, dated the 2nd September, 1880, affirming an order of Maulvi Ezid Bakhsh, Munsif of Korantadih, dated the 2nd September, 1880.

(1) I. L. R., 3 All., 388.

1881	directed the judgment-debtor, appellant, to pay the amount decreed
RAM	“ according to the terms of his written statement;” and in that
NANDAN	written statement he had undertaken, if the judgment-debt was
RAI	not discharged by a particular day, to pay interest upon it. This
v.	is all he has now been held bound to do. The appeal is dismissed
LAL DEHAR	with costs.
RAI.	

CRIMINAL JURISDICTION.

1881
August 12.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. IDU BEG.

Murder—Culpable homicide not amounting to murder—Causing death by rash or negligent act—Grievous hurt—Act XLV of 1860 (Penal Code), ss. 299, 300, 302, 304 A, 325.

Where a person struck another a blow which caused death without any intention of causing death or of causing such bodily injury as was likely to cause death, or the knowledge that he was likely by such act to cause death but with the intention of causing grievous hurt, *held* that the offence of which such person was guilty was not the offence of causing death by a rash act, but the offence of voluntarily causing grievous hurt.

Nidarmarti Nagabhushanam (1); *Queen v. Pemkoer* (2); *Queen v. Man* (3); *Empress v. Ketabdi Mundul* (4); *Empress v. Fox* (5); and *Empress v. O'Brien* (6) followed.

The offences of murder, culpable homicide not amounting to murder, and causing death by a rash or negligent act distinguished.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court.

STRAIGHT, J.—The record in this case was called for by me on a perusal of the Sessions Statement of the Judge of Cawnpore for the month of June, 1881. The accused, Idu Beg, was convicted upon the 8th June, last, under s. 304A of the Penal Code, for having caused the death of his wife Ohulki, and was sentenced to four months' rigorous imprisonment. The short circumstances out of which the charge arose are as follows:—On the 10th May last the accused while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomited and bled from the nose, and within little more than an

(1) 7 Mad. H. C. R., 119.

(2) N.-W. P. H. C. Rep., 1873, p. 38.

(3) N.-W. P. H. C. Rep., 1873, p. 235.

(4) I. L. R., 4 Cal., 764.

(5) I. L. R., 2 All., 522.

(6) I. L. R. 2 All., 766.

hour died. Upon the *post mortem* examination it was found that her "spleen was badly ruptured, almost torn across; death was caused by rupture of the spleen; there were no signs of disease of the spleen, though it was a little enlarged; there were bruises on the left side over the spleen and short ribs; there were no signs of a lengthened beating; the injury could have been caused by one severe blow or fall." By these facts it would appear to be established that the accused struck the deceased woman a violent blow, and that the direct consequence resulting from it was the rupture of the spleen, which caused her death. The primary questions in the case therefore to be disposed of were, looking at the character of the act, the instrument with which it was committed, and the extent of injury inflicted, whether (i) the accused intended to cause death or bodily injury likely to cause death? (ii) whether as a reasonable man he must have known that the act was so imminently dangerous that death or injury likely to cause death would be the most probable result? (iii) whether as a reasonable man he must have known that death would be a likely result? If the conduct of the accused fell within either of the first two descriptions, it amounted to murder; if it was covered by the latter, his offence was culpable homicide not amounting to murder. It will be convenient at once to examine the mode in which the Judge dealt with these questions.

At the outset of his judgment he remarks: "The charge against the accused is that in a quarrel with his wife he struck her one or more blows on the left side with a heavy stick, which ruptured her spleen, and caused her death within an hour: he thus caused the death of his wife by a rash act under s. 304A: s. 302 cannot possibly apply, as accused had no intention of causing death, nor can s. 325, as death (much more than grievous hurt) resulted immediately or soon after from the blow." Further on the Judge observes: "But accused was very angry at the time, and when he struck the blow he had probably not the remotest intention of causing grievous hurt, far less death: still the blows he inflicted must have been severe, and the evidence shows that both Chulki's sides bore marks of the stick: but there is nothing to show that he knew or had reason to believe that the blows were

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1881 likely to cause death : the surgeon speaks of the spleen being a little enlarged ; this might have been the case, and accused know nothing about it : I therefore find that accused caused the death of his wife by the rash act of striking her a sharp blow over the spleen, and that s. 304A is applicable."

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It is matter for regret that the Judge has not applied his mind with greater care to the provisions of the Penal Code bearing upon this case. It is strange also that he should apparently be ignorant of the numerous decisions that have been given with reference to s. 304A, notably those in *Nidarmarti Nagabhushanam* (1); *Queen v. Pemkoer* (2); *Queen v. Man* (3); *Empress v. Ketabdi Mundul* (4); *Empress v. Fox* (5); *Empress v. O'Brien* (6). The view he takes of s. 304A is directly at variance with the judgments of three High Courts, and is an erroneous one. The category of intentional acts of killing, or of acts of killing committed with the knowledge that death, or injury likely to cause death, will be the most probable result, or with the knowledge that death will be a likely result, is contained in the provisions of ss. 299 and 300 of the Penal Code. S. 304 creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted, where, an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the *Exceptions* to s. 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but intention to cause death or bodily injury likely to cause death is absent. Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder. Now it is to be observed that s. 304A is directed at offences outside the range of ss. 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned

(1) Mad. H. C. R., 119.

(2) N. W. P. H. C. Rep., 1873, p. 38.

(3) N. W. P. H. C. Rep., 1873, p. 235.

(4) I. L. R., 4 Cal., 764.

(5) I. L. R., 2 All., 522.

(6) I. L. R., 2 All., 766.

enters. For the rash or negligent act which is declared to be a crime is one "not amounting to culpable homicide," and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded. S. 304A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description. According to English law, offences of this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts. There may be in the act an absence of intention to kill, to cause such bodily injury as is likely to cause death, or of knowledge that death will be the most probable result, or even of intention to cause grievous hurt, or of knowledge that grievous hurt is likely to be caused. But the inference seems irresistible that hurt at the very least must be presumed to have been intended, or to have been known to be likely to be caused. If such intention or knowledge is present, it is a misapplication of terms to say that the act itself, which is the real test of the criminality, amounts to no more than rashness or negligence. In the present case the evidence is clear that the blow was wilfully and consciously given to the deceased woman by the accused, and he obviously therefore committed an assault at the very least. The consequences that resulted from it could not change a wilful and conscious act into a rash or negligent one, but their relevancy and importance, as indicating the amount of violence used, bore upon the question as to the character of the intention or knowledge to be presumed against the accused. Although I do not pretend for a moment to exhaust the category of cases that fall within s. 304A, I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be

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caused. The criminalty lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. The substantial point to be determined in the case now under consideration was as to the intention or knowledge with which the act was done. That the violence was knowingly and wilfully inflicted is abundantly clear, but as found by the Judge it may well be that the accused neither intended to kill or to cause bodily injury likely to cause death, and that he had not the knowledge that death would be the most probable result. The other questions that remain, namely, must he have known that death was likely to ensue, or did he intend to cause grievous hurt or hurt, or must he have known that grievous hurt or hurt were likely to be caused, are not so easily disposed of. The evidence of the Civil Surgeon establishes beyond a doubt that great violence, even though confined to one blow, must have been used to the deceased woman by the accused man. And looking to this circumstance, and the nature of the weapon employed, I should certainly not have disturbed the order of the Judge, had he convicted of culpable homicide not amounting to murder, on the ground that there must have been knowledge that death would be a likely result. At the same time I am willing to accept his conclusion that there was no such knowledge, though further than this I cannot adopt his view. If a man deals another person so ferocious a blow with a heavy stick upon a dangerous part of the body as that which was inflicted by the accused upon his wife, he cannot complain of the inference being drawn that at the very least he must have known that grievous hurt was likely to be caused. The conviction of Idu Beg under s. 304A, for the reasons I have given, is quashed, and it must be recorded under s. 325. I further order that notice be served upon him to show cause why the sentence already passed upon him should not be enhanced. (The sentence was ultimately enhanced to three years' rigorous imprisonment.)

APPELLATE CIVIL.

1881
May 5.*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*BILLINGS (DEFENDANT) v. THE UNCOVENANTED SERVICE
BANK (PLAINTIFF).**Promise to pay a debt barred by limitation—Act IX of 1872 (Contract Act),
s. 25 (3)—Judgment-debt.*

The holder of a decree for money, dated the 22nd June 1868, applied for execution on the 23rd February 1869. In September 1869, before the decree had been executed, the judgment-debtor, admitting that a certain amount was due under the decree, agreed to pay such amount by instalments, and that, if default were made, the decree should be executed for the whole amount thereof. Default having been made early in 1873, the decree-holder applied at once for execution of the decree. On the 5th May 1873, a petition, signed by the judgment-debtor, was preferred on his behalf to the Court executing the decree, such petition being in effect as follows:—"Execution-case for Rs. 6,839-15-3 : in this case the decree-holder has filed an application for execution of his decree in consequence of a default in payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to the decree-holder's demand: in future he will not fail to pay instalments: he has written a letter to plaintiff asking him to pardon his breach of promise and to agree to realize the decree-money by the instalments formerly fixed, and to stay execution of the decree for the present: the decree-holder has granted this request: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and execution of the decree be postponed for the present: in case of default being made in payment of two instalments in succession, the decree-holder will be at liberty to realize the balance of the decree-money with interest at twelve per cent per annum." At the time such petition was preferred execution of the decree was barred by limitation. *Held* that a "debt" within the meaning of s. 25 (3) of Act IX of 1872 includes a "judgment-debt," and such petition was a promise to pay a debt barred by limitation within the meaning of that law, and a suit founded on such petition to recover the balance of the money due under the decree was maintainable.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court hereinafter set out.

Messrs. *Hill* and *Leach* for the appellant.

Messrs. *Colvin* and *Conlan* for the respondent.

* First Appeal, No. 2 of 1880, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 6th October 1879.

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The order of the High Court (STUART, C.J., and STRAIGHT, J.) so far as it is material for the purposes of this report, was as follows:—

ORDER.—This was a suit brought by Mr. C. W. Stowell, the Manager at Agra of the Uncovenanted Service Bank, Limited, to recover Rs. 4,994-3-6, balance of Rs. 6,839-15-3, due from the defendant under an alleged agreement made between the parties on the 5th May 1873, with interest at the rate of 12 per cent., amounting to Rs. 2,260-14-6, or in all Rs. 7,255-2-0. The defendant, William Alfred Billings, in the lower Court contested the plaintiff's claim on the following grounds:—(i) That the arrangement of the 5th May 1873 was not a contract within s. 25, cl. (3) of the Contract Act, and could not revive a debt already barred by limitation; (ii) that even assuming it to be a fresh contract, the suit is barred by limitation, which began to run on the 5th January 1876; (iii) that the letter of the 8th March 1876, sent by defendant to the plaintiff, should not be admitted in evidence as an acknowledgment of liability within s. 20 of Act IX of 1871, being insufficiently stamped, and because it was written after limitation had run out, and also because it was obtained by fraud; (iv) that the cause of action, if any, accrued on the 5th January 1876; (v) that the defendant is not indebted to the Bank, but on the contrary the Bank owes him a sum of Rs. 70. The Subordinate Judge of Agra decreed the plaintiff's claim, deciding all the points taken in the statement of defence against the defendant. The defendant now appeals to this Court, and the questions raised before the Subordinate Judge are substantially repeated here, these further contentions being urged:—(i) That, as the arrangement of the 5th May 1873 is contained in the petition to the Court at Meerut, if it amounts to a fresh contract between the parties, it is inadmissible in evidence as not being stamped in accordance with law; (ii) that the acknowledgment of the 8th March 1876 is equally inadmissible without a stamp.

The following facts must be recapitulated. For some time prior to 1868 the defendant had been borrowing money of the Uncovenanted Service Bank, and on the 22nd June of that year a judgment for a considerable amount was obtained against him,

which, upon appeal, was confirmed by this Court on the 5th January 1869. Application for execution was made to the Court at Agra on the 23rd February 1869, and after inquiry Rs. 7,669-14-5 having been found to be due from defendant to the Bank, a certificate was granted to the decree-holder, Mr. Stowell, authorizing him to take out execution in the Court of the Judge of Meerut, within whose jurisdiction Mr. Billings was then residing. But before any active steps had been adopted to realize the decree, Mr. Stowell and the defendant entered into an agreement on the 7th September 1869, by which the latter, admitting the amount due from him to be Rs. 7,879-14-5, promised to pay it in monthly instalments of Rs. 150, and if he made default, the whole decree was to be executed at once. The instalments would appear to have been paid for some time with regularity, but default having occurred early in 1873, application was at once made to execute the whole decree, and on the 15th April an order allowing it was made. But upon the 5th May 1873, the pleader for the decree-holder filed a petition signed by the defendant to the following effect:—"Execution-case for Rs. 6,839-15-3: in this case the plaintiff, decree-holder, has filed an application for execution of his decree in consequence of a default in the payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to discharge the plaintiff's demand: in future he will not fail to pay any instalment: he has also written a letter to the plaintiff asking him to pardon his breach of promise, and agree to realize the decree-money by instalments formerly fixed, and to stay the execution of the decree for the present: the plaintiff has also granted this request of the petitioner: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and the execution of the decree be postponed for the present: in case of two defaults in payment of successive instalments, the plaintiff will be at liberty to realize the balance of the decree money with interest at 12 per cent. per annum: the execution-case may be struck off." Upon this petition the execution was struck off. Again for some time the defendant continued to pay his instalments, but having again made default on the 5th January 1876, the decree-holder applied to the Court at Agra to execute

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his decree. The defendant thereupon pleaded that its execution was barred by limitation, and further that it had already been satisfied by payment. On the 16th May 1876, the Judge disallowed the judgment-debtor's pleas, and ordered execution to proceed, but upon appeal to this Court his decision was reversed. The decree-holder being thus barred from enforcing his original decree brought the present suit on the 28th February 1879, on the basis of an agreement of the 5th May 1873, and he alleges his cause of action to have accrued in April 1876, when two successive instalments remained unpaid, and more particularly on the 31st January 1877, when this Court allowed his judgment-debtor's objection to the execution of his decree.

The case on the part of the appellant was very ably argued before us by Mr. Hill, and his substantial contentions were that the contract contained in the petition of 5th May 1873, upon which he urged the plaintiff's suit was brought, was void, as being without consideration: that exception (3), s. 25 of the Contract Act did not apply to it, because the word "debt" used therein did not mean judgment-debt, and in support of this view he referred to the analogous provisions of s. 20, Act IX of 1871, and quoted two decisions of the Calcutta Court,—*Kally Prosonno Hazra v. Heera Lal Mundle* (1); *Mungol Prashad Dichit v. Shama Kanto Lahory Chowdhry* (2). He further argued that, assuming the petition of 5th May 1873 to be a good contract, it must be regarded as in the nature of a bond, and being insufficiently stamped, that it was inadmissible in evidence; also that the letter of the 8th March 1876, being written after limitation had run out, was not such an acknowledgment as would give the plaintiff a fresh start, and if it was looked upon as a new contract was insufficiently stamped, and therefore inadmissible. The plaintiff's cause of action, he contended, arose upon the 5th January 1876, and the present suit not having been brought till the 28th February 1879, is barred by limitation. Mr. Leach, who followed on the same side, directed his attention to the accounts, questioning the accuracy of the finding of the Subordinate Judge as to the balance due, and arguing, among other matters, that payments made by the defendant

(1) I. L. R., 2 Calc., 468. (2) I. L. R., 4 Calc., 708.

to the Bank on account of the principal debt had improperly been credited to the account of interest. For the respondent Mr. Conlan replied that the suit was not based upon the petition itself as a contract, but upon an agreement between the parties of which it was evidence, and in support of his contention as to its admissibility he quoted *Ramdayal v. Jhaunna Lal* (1); R. A. No. 82 of 1876 decided the 3rd May 1877; R. A. No. 85 of 1876 decided the 9th May 1877. For such an agreement he argued the barred judgment-debt was good consideration—*Heera Lal Mookhopadhyaya v. Dhunput Singh* (2); and moreover limitation had not run upon the agreement of the 7th September 1869, and as the plaintiff might have sued the defendant under that, there was this further consideration. With regard to the letter of the 8th March 1876, he contended that was a clear acknowledgment of liability under the agreement of the 5th May 1873, and was given within three years from that date.

We are of opinion that this appeal should be dismissed and that the plaintiff should succeed. The only difficulty we have had is in determining whether the petition of 5th May 1873 is to be regarded as the agreement itself, and therefore the basis of the suit, or whether it can be treated as evidence of a verbal arrangement between the parties. It appears to us that, in order to bring the plaintiff's case within exception (3), s. 25 of the Contract Act, it is necessary for him, before he can establish a good agreement, to show a promise in writing signed by the person to be charged therewith, and that it is only upon such written promise a suit can be maintained, when the consideration for it is a barred debt. We do not think that we can admit a parol understanding between the parties of which the petition is merely evidence. It either is or is not a promise in writing amounting to a contract within exception (3), cl. 25 of the Contract Act. If it is, then it must necessarily be the basis of the suit; if it is not, then the plaintiff's case must fail. In our judgment, however, the petition of the 5th May 1873 distinctly falls within the terms of the section of the Contract Act already referred to, and is a promise in writing signed by the person to be charged therewith to pay a debt of which the creditor

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(1) N.-W. P. H. C. Rep., 1871, p. 14. (2) I. L. R., 4 Cal., 500.

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might have enforced payment but for the law relating to the limitation of suits. We see no analogy in the terms of s. 20 of Act IX of 1871, for while they deal with an acknowledgment of a debt during the period limitation is running, the section of the Contract Act with which we are dealing makes a barred debt in specific terms good consideration for a promise in writing to pay. The plaintiff's suit therefore can properly be maintained on the petition of 5th May 1873. But it is further contended that as a contract the petition is insufficiently stamped. The objection is taken for the first time in this Court, and were we constrained to give effect to it, we should certainly afford the plaintiff all the opportunities that could be given him to make up any deficiency. But it does not appear to us that the appellant's contention that the petition amounts to a bond can be maintained : on the contrary, the document seems naturally to come within art. 11, sch. ii, Act XVIII of 1869.

(After holding that the letter of the 8th March 1876 was an acknowledgment within s. 20 of Act IX of 1871 of the liability under the agreement of 5th May 1873, and of the debt due to the Bank, and that being sufficiently stamped it was properly receivable in evidence in order to save limitation, and the suit had therefore been properly brought and was within time, the order continued as follows :) The remaining question relates to the accounts and to the precise amount of principal and interest to be decreed to the plaintiff. We are not altogether satisfied at the mode in which the Subordinate Judge arrived at the sum decreed by him, and before finally disposing of this appeal we think that it would be desirable to submit the accounts to some person of experience and ability in banking matters, to be agreed upon between the parties and approved of by this Court, for him to determine what the balance is remaining due from Mr. Billings to the Bank. His starting point should be the 5th May 1873, when the defendant admitted Rs. 6,839-15-3 was owing from him. When this inquiry has been made and a report sent in to us, we can then proceed finally to dispose of the case. For the present it would be sufficient to say that this appeal is dismissed in so far as objection was taken in appeal to the plaintiff's maintaining his suit, but the amount to be decreed to him and the question of costs are reserved.

CIVIL JURISDICTION.

1881
April 21.*Before Mr. Justice Straight and Mr. Justice Oldfield.*

DHIRAJ KUAR (PLAINTIFF) v. BIKRAMAJIT SINGH (DEFENDANT).*

Void agreement—Immoral consideration—Agreement without consideration—Past cohabitation—Act IX of 1872 (Contract Act), ss. 2(d), 25(2).

Past cohabitation would not be an immoral consideration, if consideration it can properly be called, for a promise to pay a woman an allowance. Such a promise, however, is to be regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary.

THE plaintiff in this suit stated that she had lived with the defendant as his wife; that the defendant had agreed to allow her Rs. 2 per mensem for her maintenance; that he had paid her such allowance until the 20th August, 1880, but that from and after that date he had ceased to pay the same; and she claimed Rs. 8 being arrears of such allowance for four months. As evidence of such agreement the plaintiff produced a copy of a petition, dated the 15th November, 1876, preferred by the defendant in certain criminal proceedings, the terms of which were in effect as follows: "The petitioner had kept Dhiraj Kuar (plaintiff) for two years; it had been agreed between the petitioner and Dhiraj Kuar that he should supply her with food and raiment and keep her in his house, and that, should he turn her out of his house, he should make her an allowance of Rs. 2 per mensem." The Court of first instance (Court of Small Causes) dismissed the suit, observing as follows: "I think the agreement to pay for maintenance of the woman is void for want of valid consideration; the woman was the mistress of the defendant, and the consideration for which the agreement was made was immoral and therefore invalid."

The plaintiff applied to the High Court to revise under s. 622 of Act X of 1887 the decree of the Court of first instance, contending that the consideration for the agreement was her past cohabitation with the defendant, and such consideration was not illegal.

* Application, No. 28B. of 1881, for revision under s. 622 of Act X of 1877 of a decree of Babu Kashi Nath Biswas, Judge of the Court of Small Causes, at Mirzapur, dated the 7th January, 1881.

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Munshi *Kashi Prasad*, for the plaintiff.DHIRAJ
KUARMaulvi *Abdul Rahman*, for the defendant.v.
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The Court (STRAIGHT, J., and OLDFIELD, J.,) delivered the following judgment:—

STRAIGHT, J.—We think it reasonable to infer that the agreement between the parties, of which the petition of the 15th November, 1876, is some evidence, was that an allowance of Rs. 2 per mensem should be paid by Bikramajit Singh to Dhiraj Kuar by way of provision for her, on account of their past cohabitation together. Such a consideration, if consideration it can properly be called, which seems to us more than doubtful, would not be immoral, so as to render the contract "*de facto*" void. But we think the more correct view is to regard the promise to pay the allowance as an undertaking on the part of Bikramajit Singh to compensate the woman for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary. The decision of the Small Cause Court Judge must be reversed, and the claim of the plaintiff decreed with costs. She will also get the costs of this application.

Application allowed.

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May 9.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

Reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879.

Security-bond for due accounting for "property" received by virtue of office—Act I of 1879 (Stamp Act), sch. ii, No. 12 (b).

The question was whether a bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by him of "public moneys, deposits, notes, stamp-paper, postage labels, or *other property*" of Government committed to his charge was or was not exempted from stamp-duty by the provisions of art. 12 (b) of sch. ii of Act I of 1879, regard being had to the words "or other property."

Per STUART, C. J., that such bond was one to secure the "due execution of an office" and the "due accounting for money received by virtue thereof," and

nothing more, as the words "or other property" must be taken to mean property of the same kind as previously mentioned, and therefore "money" or the like of money, and such bond was therefore exempted from stamp-duty by the provisions of art 12 (b) of sch. ii of Act I of 1879.

Per OLDFIELD, J., that, inasmuch as the words in art. 12 (b) of sch. ii of Act I of 1879 "or the due accounting for money received by virtue thereof" should be regarded as mere surplusage, and the "due execution of an office" and the "due accounting for money received by virtue thereof" be considered one and the same thing, and as the due accounting for property received by him by virtue of his office was the "due execution of his office" by the officer in this case, such bond was one for the "due execution of an office" and was therefore exempted from stamp-duty.

Per SPANKIE, J., and STRAIGHT, J., that, inasmuch as the words in art. 12 (b) of sch. ii of Act I of 1879 could not be regarded as mere surplusage, and there was a distinction drawn by the Legislature between the "due execution of an office" and the "due accounting for money received by virtue thereof," such bond was not one for the "due execution of an office," and being one for the due accounting for "property," it was not one for the due accounting for "money," and therefore it was not exempted from stamp-duty.

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, as to the amount of stamp-duty chargeable on a bond entered into by the sureties of the Government treasurer in the Collector's office, Moradabad, dated the 5th November, 1879. This instrument had been exempted from stamp-duty, with reference to art. 12 (b), sch. ii of Act I of 1879. The following is a translation of the material portion of the bond: "Whereas — has been appointed treasurer in the Collectorate for the district of — and has filed his engagement of this date for the due discharge of the various trusts confided to him, we, in consideration of his being so appointed, of our free choice and intelligence, guarantee the honest and faithful administration on the part of the *sadr* treasurer aforesaid, his substitute during any temporary absence, and the subordinate agents appointed by him or on his nomination: should any loss or deficiency occur in public moneys, deposits, notes, stamp-paper, postage labels, or other property of Government committed to the charge of the treasurer, from the non-production of accounts, or from the misconduct or negligence of himself, of any temporary substitute appointed with his consent, or of agents appointed by him or on his nomination, whether at the *sadr* or *mufassal* offices of the district, we engage

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to make good the amount without delay or any pretext." The Board, having regard to the fact that the sureties bound themselves to make good to Government any loss or deficiency not only in "public moneys, deposits, notes, stamp-paper, postage labels," but also in "*other property*" of Government committed to the charge of the treasurer, were doubtful whether the bond had been rightly exempted under art. 12 (b), sch. ii of Act I of 1879 from stamp-duty, and this point it referred to the High Court for determination. The Board's own opinion on the point was as follows:— "The question is whether the words 'executed by officers of Government or their sureties to secure the due execution of an office or the due accounting for money received by virtue thereof,' [art. 12 (b), sch. ii of Act I of 1879], by which a certain class of instruments are declared exempt from stamp-duty, cover the security-bond of an officer into whose hands property other than money comes, and who in the course of his duty is responsible to Government for the due custody and disposition of the same. Such a class of officers are the nazirs of Civil and Revenue Courts, and hitherto the practice has been to take unstamped bonds from them. But if it is ruled that the exemption from stamp-duty above quoted does not extend to any clause in their bonds by which they pledge themselves to render account for all property received by them, it will be requisite either to stamp such bonds or to modify the wording of the exemption. It will be observed that the wording of the exemption [art. 12 (b), sch. ii] is identical with that of the corresponding article of sch. i (art. 14), by which the duty on security bonds is fixed; and art. 14 of sch. i seems to the Board to apply to all security-bonds for the due execution of an office, including those in which one of the duties is to account for property received. The exemption was intended to have the same scope as the article imposing the duty, and on this account the words 'or the due accounting for money received by virtue thereof' were added. The Board think that but for this wish to make the article and the clause imposing the duty conterminous, these words would not have been added. The exemption would then have stood 'executed by officers of Government or their sureties to secure the due execution of an office,' and to account for money or property received is usually supposed to be one of the chief ways in which an office

is duly executed. Under the old Act (XVIII of 1869) the exemption in favour of these bonds was thus worded (s. 15, cl. 7), and when it was pointed out in 1878 to the Government of India that the exemption was silent as to bonds 'to account for money,' which were specified in art. 12 of schedule i of Act XVIII of 1869, the Government explained that the exemption, as worded, was meant to apply to all security-bonds given by officers who, as part of their duty, have to account for money. In amending the new Act the words 'to account for money' were, as has been mentioned, added simply to make the exemption co-extensive with the article imposing the duty, and remove whatever doubt might have existed before. It has been pointed out by the Government of India that in respect to all property other than money the officer intrusted with it is under a specific contract, and that to fulfil this contract is part of his ordinary duty, for the due execution of which he has given a bond."

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The reference was laid before the Full Court.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the Board of Revenue.

Pandit *Bishambhar Nath* and *Lala Harkishen Das*, for the sureties.

The Court delivered the following judgments :

STUART, C. J.—The pressure and multiplicity of other business has prevented me until to day considering the question submitted to us by the Board of Revenue in this case, although since it was heard it has very much occupied my mind. At the hearing I entertained considerable doubts on the subject, but a very careful examination of the Stamp Act has satisfied me that the instrument before us ought to be regarded as exempt from duty. The letter from the Board does not appear to me to state the case with sufficient clearness, or with a due regard to the legal meaning and scope of the bond by the sureties. The letter lays undue stress on the expression "or other property," and makes no allusion to the subsequent and operative engagement undertaken by the sureties, by which, as will be presently seen, their

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responsibility is determined. The provision of the Stamp Act under which the question must be considered is that contained in sch. ii of the Act headed "Instruments exempted from duty," and in (b) of No. 12 of that schedule, which is in these terms:— "Instruments executed by officers of Government or their sureties to secure the due execution of an office, or the due accounting for money received by virtue thereof." I cannot agree to the suggestion that any part of this provision may be regarded as surplusage, nor on the other hand do I consider that the introduction of the words "or other property" takes the bond out of the exemption; these words simply, in my opinion, forming part of the engagement as to the execution of the office. There is no specification in the bond of such other property excepting such as may be derived from the context, and that I may say at once simply means money or its convertible equivalent. The terms of the schedule under consideration are intended to apply to two classes of instruments, those which secure the due execution of an office, and do not provide for any accounting for money, and those which, while securing the due execution of an office, do provide for such accounting, but both of which instruments it is intended to exempt from duty. The bond in the present case falls under the latter description as being an instrument for the due execution of an office, and for securing the due accounting for money in virtue thereof, and it is therefore exempt from duty. The bond recites the appointment to the office of treasurer of the district referred to; that he has filed his engagement; and that in consideration of his being appointed, the sureties "guarantee the honest and faithful administration" of the treasurer or his substitute, and his subordinate agents, and the precise nature and nature of this guarantee is explained as follows: "Should any loss or deficiency occur in public moneys, deposits, notes, stamp-papers, postage labels, or other property of Government committed to the charge of the treasurer, from the non-production of accounts, or from the misconduct or negligence of himself, of any temporary substitute appointed with his consent, or of agents appointed by him or on his nomination, whether at the sadr or mufassal offices of the district, *we engage to make good the amount without delay or any pretext.*" That is

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to say, for whatever loss the Government may sustain from this officer's mismanagement, misfeasance or defalcations, we hold ourselves liable, and we engage to make good the amount, or in other words to pay to the Government in money the estimated loss. Such was the sureties' guarantee to the Government. Now if there were nothing more in the bond, such provisions might be taken to secure the due execution of the treasurer's office. But the bond also provides that "for the further securing the payment of all moneys that we may be bound to pay by virtue of these presents," the sureties mortgage certain specified property, and covenant and agree that the Collector for the time being shall have power to sell any portion of that property "in satisfaction of and for this money or any moneys for which we may be liable under the bond, and ending in these terms: "And if the proceeds of sale of the property herein pledged fail to cover any loss or deficiency above mentioned, then the Collector for the time being shall be at liberty to attach and sell any other property we may now have or may hereafter acquire." These provisions are certainly ample for the purpose of securing the due accounting for money. But they do not go further, the enumeration of particulars in the first part of the bond being controlled by the subsequent engagement to make good any loss or deficiency; and as to the expression "or other property," that must be read in connection with the other particulars in the sentence in which it is found, and be taken to be *ejusdem generis*, and therefore to mean simply money or its proper equivalent, neither more or less. There was a good deal of discussion at the hearing as to what "money" legally meant, that is, what is included in the word, and it seemed to be thought that in law money only meant coin in gold, silver, or copper. That, however, is not the legal meaning of the term; it means and includes not only coin, but also bank notes, Government promissory notes, bank deposits, and otherwise and generally any paper obligation or security that is immediately and certainly convertible into cash, so that nothing can interfere with or prevent such conversion. But the definition of money is not in my view material to the question before us, the obligation on the part of the sureties being such as to leave no doubt as to their liability being a mere pecuniary

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one, but not necessarily to be measured by any arbitrary meaning or limit to be put on the word "money."

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SPANKIE, J.—Regulation X of 1829, Acts XXXVI and X of 1860 and 1862, respectively, exempted (apparently) all bonds executed by Government or Government officers for the due execution of an office. There was no special exemption, but there was a general exemption and rule. Act XVIII of 1869, s. 15 (7) exempted from duty bonds to Government for the due performance of the duties of a salaried office. But art. 12, sch. i of the Act contains an addition of an important character. Bonds are referred to in this article not only for the due execution of an office, but also "or to account for money received by virtue thereof." The Stamp Act now in force (I of 1879) expressly exempts instruments executed by officers of Government and their sureties "to secure the due execution of an office, or the due accounting for money received by virtue thereof." Certainly looking at the earlier Acts, we are at liberty to assume that the addition made in reference to accounting was purposely made by the Legislature, and we must look upon it as an acknowledgment that there was something wanting in the earlier Acts. But on the evidence before us we are not at liberty to assume that the addition of the words "or the due accounting for money received by virtue thereof" was mere surplusage. On the contrary, there is more reason to believe that the Legislature purposely corrected an omission. For Act XII of 1850 required that public accountants should provide security for the due discharge of the trusts of office, and for the due account of all moneys which came into their possession or control by reason of their offices. Act XVIII of 1869 differs little in language from Act XII. of 1850, substituting or rather using the words "the due execution of an office" instead of the words "the due discharge of the trusts of office", and the words "to account for money received by virtue of office" instead of the words "and for the due account of all moneys which shall come into his possession or control by reason of his office." Moreover, when the present Act was drafted, art. 14, sch. i, stood as it stands now and as the corresponding article in Act XVIII of 1869 was passed. But the exemption when the Bill was originally before Council was

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confined to instruments executed by salaried officers of Government to secure the due performance of their duties. It may be that the wording of the Viceroy's Notification of 1876 was followed, which followed the exemption provided by s. 15 (7) of Act XVIII of 1869. But when the Bill became law, the words "or the due accounting for money received by virtue thereof" were added, and we must conclude that they were deliberately added. Thus the Legislature appears to have drawn a distinction between the due execution of an office and the due accounting for moneys received by virtue thereof, and it is only natural that it should do so, because there may be an office with duties which does not involve the receipt or custody of money, whilst in another the receipt and control of money received by virtue of the office form the chief and most important duty. Moreover, when the language of an Act is free from doubt, it best declares without more language the intention of the law-givers and is decisive of it. The Legislature in such a case must be intended to mean what it has plainly expressed, and consequently there is no room for construction. This is the rule, and a safe one. When the language is clear and plain, to say that it is surplusage is to suggest that the Legislature did not know its own meaning and purpose. Having arrived at this conclusion after a consideration of the wording of the several Acts of the Legislature, in so far as they relate to the question before us, I am quite of the same mind with my colleague Mr. Justice Straight, whose opinion I have seen, and whose conclusion I take the liberty of citing here, that, "supposing therefore a bond merely executed to secure the due execution of an office, the language of this article [12 (b), sch. ii, Act I of 1879] would preclude the construction that it covered the 'due accounting for money' received by virtue of such office. If then we are to assume, and the assumption seems irresistible, that the words 'due execution of an office' were considered insufficient to include 'due accounting for money', then *a fortiori* they cannot be held to cover the non-accounting for other property." For unless it can be shown that "public moneys," the words used in the surety-bond, include deposits, notes, stamp-paper, postage labels, or other property of Government, it cannot be contended that the exemption in (b), art. 12 of the second schedule covers such various property.

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If it could be shown that " money received by virtue of (the treasury) office " included all the other property cited above, then indeed the addition of the words "deposits, notes, stamp-paper, postage labels or other property of Government" is mere surplusage, and the instrument is exempt from duty. But this has not been shown in any way, and as far as I know such a contention cannot be supported. I would therefore reply to the reference that such an instrument as that marked *A* is only exempted by the Act in regard to a suretyship to secure the due execution of the office and the due accounting for money received by virtue thereof, but if there is a suretyship for anything beyond this, the instrument is chargeable with duty in respect of such further suretyship.

OLDFIELD, J.—Clause (b), art. 12, sch. ii, Act I of 1879, exempts from stamp-duty instruments executed by officers of Government or their sureties to secure the due execution of an office or the due accounting for money received by virtue thereof. The instrument *A* is one executed by the sureties of the *sadr* treasurer to secure the due execution of his office, and so far comes within the exemption in the first part of the clause, and it is not taken out of the exemption by that part of the deed which provides for security against loss of property committed to the charge of the treasurer, so far as the accounting for such property forms part of the duties of his office, since the security must be considered to be given for the due execution of the office. I do not think it is necessary to take the last part of the clause, which specially exempts instruments to secure the due accounting for money received by virtue of an office, as intended to mark a distinction between security for the due accounting for money received by virtue of an office and for due accounting for other property received by virtue of an office. It seems reasonable to hold that the due accounting for property received by virtue of an office is something which is included in the due execution of an office, and it is not necessary to assume the contrary from the mere introduction of the special exemption referred to, since there might be reasons such as the Board of Revenue have pointed out for introducing that clause, quite apart from any consideration of the kind. I am disposed to regard that part of the clause as surplusage.

STRAIGHT, J.—I am of opinion that the bond to which our attention is called by this reference, being for the due accounting for property other than money, is not within the exemption of art. 12, cl. (b), sch. ii to the Stamp Act (I of 1879.) The difficulty has been created by the introduction of the words “or the due accounting for money received by virtue thereof,” which I cannot concur with my honorable colleague Mr. Justice Oldfield should be regarded as surplusage. On the contrary, the Legislative authorities would seem to have drawn a distinction between the due execution of the duties of an office and the due accounting for moneys received by virtue thereof, as if the latter obligation were not necessarily part of the duties under the former. Supposing therefore a bond merely executed “to secure the due execution of an office,” the language of this article would preclude the construction that it covered the “due accounting for money” received by virtue of such office. If then we are to assume, and the assumption seems irresistible, that the words “due execution of an office” were considered insufficient to include “due accounting for money,” then *a fortiori* they cannot be held to cover the non-accounting for other property. The express mention of money seems to exclude any accountability for other property, and so inferentially to place a limitation upon the earlier words of the article, which, had they stood alone, need not have been applied.

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APPELLATE CIVIL.

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Before Mr. Justice Straight and Mr. Justice Tyrrell.

BENI MADHO AND ANOTHER (DEFENDANTS) v. ZAHURUL-HAQ AND OTHERS (PLAINTIFFS).*

Sale in execution of decree of house in Mohalla—Right of zamindars to “haqq-i-chakaram”—Wajibularz—Liability of auction-purchaser.

The zamindars of a certain mohalla claimed from the purchaser of a house situated in such mohalla which had been sold in execution of a decree one-fourth of the sale-proceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the *wajibularz*. That document stated,

*Second Appeal, No. 1105 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 16th July, 1880, affirming a decree of Maulvi Ahmad-ul-lah, Munsif of Gorakhpur, dated the 19th March, 1880.

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inter alia, that, when a house in such mohalla was sold, a cess called *chaharam* was received by such zamindars "according to the understanding arrived at between the seller and the zamindars." Held that such zamindars were not entitled under the terms of the *wajib-ul-arz* to one-fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser, could not be regarded as the "seller," and it was only the "seller" who was liable; that the terms of the *wajib-ul-arz* were applicable only to private and voluntary sales and not to execution-sales; and that under these circumstances the suit must be dismissed.

THE plaintiffs in this suit claimed Rs. 50, being one-fourth of Rs. 200, the proceeds of a sale in execution of a decree of a house belonging to one Bishan, a carpenter, situate in mohalla Kazipur Kalan, in the city of Gorakhpur. The plaintiffs were the mohalladars or zamindars of the mohalla, and founded their claim on local custom as recorded in the *wajib-ul-arz*. The original defendant in the suit was the holder of the decree in execution whereof the house had been sold and the purchaser of the house. The tenth clause of the *wajib-ul-arz* stated, amongst other things, that "when a house (in the mohalla in question) was sold, a cess called *chaharam* was received according to the understanding mutually arrived at between the seller and the mohalladar." The Court of first instance gave the plaintiffs a decree, which, on appeal by the representatives of the original defendant, who had died, the lower appellate Court affirmed.

On second appeal by such persons it was contended on their behalf that under the terms of the *wajib-ul-arz* the plaintiffs were not entitled to claim any thing from purchasers of houses; that they were not entitled to claim a fourth of the purchase-money; and that the terms of that document were not applicable to sales in execution of decrees.

Babu Sital Prasad Chattarji and Maulvi Mehdi Hasan, for the appellants.

Shaikh Maula Bakhsh, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRELL, J.) was delivered by

STRAIGHT, J.—The plaintiffs-respondents are zamindars, and their claim was for Rs. 50, out of Rs. 200, purchase price, as "*chaharam*," to which they alleged themselves to be entitled,

under the *wajib-ul-arz*, in respect of an auction-sale in execution of decree of a house belonging to a resident of their mohalla. The defendants-appellants were the decree-holders and auction-purchasers. Both the lower Courts decreed the claim, but in our opinion erroneously. There is no provision of the *wajib-ul-arz* under which the respondents acquired any right to one-fourth of the sale proceeds as against the auction-purchaser; on the contrary there is a provision which, if applicable, entitles them to a much less sum. The decree-holder, because he happens to have become the auction-purchaser, cannot possibly be regarded as the "seller," and it is only the "seller" who is bound to pay one-fourth of what he may realize. Indeed, it would seem moreover that the clause of the *wajib-ul-arz* upon which the respondents based their suit was only applicable to private and voluntary sales and not to those held compulsorily under process of law. The appeal must be decreed with costs, and the suit as brought dismissed.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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AJUDHIA NATH AND OTHERS (DEFENDANTS) v. ANANT DAS AND ANOTHER (PLAINTIFFS).*

Insolvent—Assignment to trustees for benefit of creditors—Notice to creditors to register claims—Refusal of trustees to register claim preferred after time—Cause of action—Joinder of parties—Act X of 1877 (Civil Procedure Code), ss. 28, 31.

The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the time notified by them, and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claims within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time; but it did not empower them to refuse to register claims made after that time but before distribution of the assets. *Held that*

* Second Appeal, No. 466 of 1880, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 13th February, 1880, affirming a decree of Rai Makhan Lal, Subordinate Judge, dated the 23rd May, 1879.

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the trustees had been properly joined as defendants in such suit ; that their refusal to register the plaintiff's claim gave him a cause of action against them ; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it.

THE facts relating to this suit were as follows:—By an instrument made the 30th November, 1875, one Mul Chand assigned to certain trustees all his moveable and immoveable property for the benefit of his creditors. In 1876, the Bank of Bengal, one of his creditors, instituted a suit against him and the trustees for, amongst other things, a declaration that this deed of assignment was fraudulent and void against the creditors of Mul Chand. On the 26th April, 1876, the High Court, to which the suit had been transferred for trial in the exercise of its extraordinary original civil jurisdiction, passed a decree in the suit, whereby, *inter alia*, it declared the deed of assignment to be valid and established, and that the trustees had liberty to apply for the opinion, advice, and direction of the Court (according to the provisions of Act XXVIII. of 1866) upon any question respecting the management, winding up, and division of the trust estate. On or about the 31st May, 1876, after the passing of this decree, the trustees, by a public advertisement, called upon all creditors of Mul Chand to register their claims at the office of the acting trustee in Allahabad on or before the 12th June, 1876, and notified that after that date no claims would be admitted. On the 17th December, 1878, after a portion of the assets of the trust estate had been distributed among the creditors who had registered their claims, the trustees made an application to the High Court under the decree of the 26th April, 1876, for its direction and advice respecting the claims of certain creditors of Mul Chand, who had not registered their claims within the time fixed by such public advertisement, but who notwithstanding claimed to share in a dividend about to be declared. The plaintiffs in the present suit, who were the holders of a dishonoured bill for Rs. 5,000 drawn by Mul Chand, were amongst such creditors. In January, 1879, while this application was pending, the present suit was instituted, in which the plaintiffs claimed the amount of such bill, joining as defendants the trustees, on the ground that they had refused either to pay them the amount of such bill, or to register their claim. On the 7th April, 1879, the High Court

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(Pearson, J.) made an order directing that the trustees should inquire into the claims of such creditors. The material portion of this order was as follows:—"The duty of the trustees under the trust deed is to 'pay and divide the clear residue of the said moneys unto and among *all* the creditors of the said Lala Mul Chand rateably in proportion to the amount of their respective debts.' 'These presents,' again it is said, 'are intended to operate as a trust deed for the benefit of *all* the creditors.' The distinction between registered and unregistered creditors appears to have arisen out of an arbitrary proceeding of the trustees, who on or about the 31st May, 1876, by a public advertisement, called upon all creditors of Lala Mul Chand to register their claims at the office of the acting trustee in Allahabad on or before the 12th June, 1876, and notified that after that date no claims would be admitted. To call upon the creditors to prefer their claims was quite proper; but I can hardly think that the trustees were justified in refusing to entertain any claims not preferred within twelve days. On the contrary I conceive that they are bound to entertain all claims preferred to them at any time pending the trust. They were not bound to postpone indefinitely the distribution of the assets until it was certain that every claim had been preferred. The trust deed declared that 'the trustees shall be at liberty to make a distribution equally according to their respective claims three months after the date hereof; and should all the creditors not prefer their claims within three months from the date of notice of this trust in the *Pioneer and Government Gazette, North-Western Provinces*, the trustees shall not be liable to the said creditors for having distributed the assets of the trust within the prescribed period'. Had the assets of the trust been wholly distributed before the unregistered creditors had preferred their claims after due notice given to them, the trustees might have been held blameless in the matter. But only a portion of the assets of the trust has as yet been distributed. Even before that distribution took place many of the unregistered creditors had preferred their claims, but their claims were not registered, because they were not preferred before the 12th June, 1876, or because the proofs of the claims were not simultaneously submitted, or because application was not made in express terms for the registration of the claims,

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or for some other and not always a better reason. If these persons were guilty of *laches*, I should think that they had suffered for them sufficiently by not having been allowed to share in the former dividend, at the time when it was declared, but the view that they have forfeited in any degree their rights as creditors to share equally, if possible, in the whole assets in proportion to their respective claims, or that the registered creditors have acquired by virtue of the registration of their claims a right superior in law to that of the unregistered creditors, does not seem to me to be tenable on grounds of reason or equity. In my opinion the trustees should inquire into all claims preferred to them, and should award to each claimant whose claim is proved to their satisfaction his proportionate share in the whole assets". The trustees set up as a defence to the present suit that it was improperly framed, by reason of misjoinder of causes of action; that the plaintiffs had no cause of action against them; that the claim of the plaintiffs had not been registered because they had not applied for its registration within the time fixed, and they refused for a long time to acknowledge the trust; that they (the defendants) were now prepared to register the claim, the High Court having ordered them to register all claims; and that, while their application seeking advice from the High Court was pending, they had expressed their willingness to register the claim, if the plaintiffs consented to abide by the order of the High Court, but the plaintiffs would not so consent. The Court of first instance gave the plaintiffs a decree against the defendant Mul Chand for the amount of the claim, with costs and interest, directing that they should "receive the amount of the decree proportionately along with other creditors of the insolvent judgment-debtor from the property held by the trustees." This decree was affirmed by the lower appellate Court on appeal by the trustees. On second appeal by the trustees it was contended on their behalf that the plaintiffs had no cause of action against them; that the cause of action against the trustees (if any) could not be joined in one suit with the cause of action against the defendant Mul Chand; and that there was a misjoinder of parties (defendants) in the suit.

Mr. Ross, the *Junior Government Pleader* (Babu Dwarka Nath Banarji), and Pandit Bishambhar Nath, for the appellants.

Babu Oprokash Chandar Mukarji, for the respondents.

The Court (STUART, C. J., and SPANKIE, J.) delivered the following

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JUDGMENT.—The plaintiff sued to recover the amount of a promissory note made by Lala Mul Chand, which the latter failed to retire when it became due. He represented that Mul Chand had become insolvent, and had assigned his property to certain persons for the benefit of his creditors: that the debt due to plaintiff was entered in the schedule of debts due by him which he made over to the assignees: on this the plaintiff called on the trustees to pay the money or enter the claim for payment in their register but they declined to pay the money or to enter the claim: the plaintiff therefore was compelled to bring this suit, and as the trustees were in possession of the assets belonging to the maker of the note, and refused to register the debt, he was obliged to make them parties to the suit along with the maker. The trustees contend that the suit was bad for misjoinder, as there is not a single cause of action against them and Lala Mul Chand: the plaint contains no cause of action against the trustees: the name of plaintiff was not entered in the register, because he had not applied for the registry within the time fixed by the trustees, and he did not acknowledge the trust for a long time: now the High Court has ordered them to register all claims, and they are prepared to do so: whilst the application of the trustees, seeking advice from the Court, was pending, the trustees had expressed their willingness to register the claim, if the plaintiff consented to abide by the Court's order, but plaintiff would not so consent. The first Court finds the plaintiff had a cause of action against the trustees, and that the suit was not barred for misjoinder. The Subordinate Judge also found that the suit would have been barred by limitation had plaintiff agreed to abide by the condition offered by the trustees, and waited until this Court had disposed of the petition pending before it. The first Court decreed the claim with costs and future interest at six per cent. against Lala Mul Chand and his property held by the trustees, but with this condition, that the plaintiff should receive the decretal amount proportionately with the other creditors from the property held by the trustees. It adjudged their own costs against the trustees. The

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trustees appealed and their grounds were similar to those urged in their reply to the suit. The Judge rejected the pleas and observed that no decree had been given against the trustees personally but only so far as they represent the trust, Lala Mul Chand having become bankrupt, and he held that they had been properly made defendants in the suit. The same objections are taken to this finding that were taken in the lower appellate Court, and it was orally contended that the trustees should not have been made to bear their own costs, and the Judge had not sufficiently tried whether their act had given any cause of action to the plaintiff. We entertain no doubt that there was no misjoinder. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities. The matter here was the liability in the first instance of the maker of the note to pay the amount due on it. There is no insolvency law here, and the defendant in effect said: "I can't pay because I am insolvent, you must go to the trustees." The trustees who have the assets belonging to the debtor refuse to pay the debt or enter the claim for future payment. The plaintiff's claim on the note would have been entirely barred if he had not brought this suit. Two days' delay would have been fatal to him. He was entitled with the other creditors to relief from the trustees, and when they refused it, we think that they were properly made parties, for the purpose of enabling the plaintiff to recover his debt from the debtor's estate. But apart from this, s. 31 of Act X of 1877 provides that no suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In our opinion the trustees should not have refused to enter the claim and should not have attempted to subject the plaintiff's claim to any condition. That they did so is admitted by themselves. The Judge of this Court before whom the application referred to by the trustees was filed records that "the distinction between registered and unregistered creditors appears to have arisen out of an arbitrary proceeding of the trustees, who on or about the

31st May, 1876, by a public advertisement, called upon all creditors of Lala Mul Chand to register their claims at the office of the acting trustee in Allahabad before the 12th June, 1876, and notified that after that date no claims would be admitted." The learned Judge did not consider the trustees justified in refusing to entertain any claims not preferred within twelve days; on the contrary he held them bound to entertain all claims preferred to them at any time during the pendency of the trust. He then shows that under the terms of the trust the trustees might distribute the assets equally within three months after the date of the trust, and if all the creditors did not prefer their claims within three months after notice of the trust, then the trustees would not be liable to the said creditors for having distributed the assets of the trust within the prescribed period. The trustees had not distributed the assets before the unregistered creditors had preferred their claims, which were not registered because they had not come in before the 12th June, 1876. The plaintiff appears to have acquiesced in the trust and to have sought registry before the distribution was made, and when he failed to obtain payment or a recognition of his claim from the trustees, they can hardly be considered blameless, and were therefore properly made parties. At the same time, if the decrees of the lower Courts are understood to make the trustees liable for costs, it must also be understood that they themselves are not personally liable, but that the trust estate is liable. We dismiss the appeal with costs, the costs of both parties being payable from the assets of the debtor in the hands of the trustees.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

SEVA RAM (PLAINTIFF) v. ALI BAKHSH (DEFENDANT).*

Estoppel—Auction-purchaser.

In 1871 *M*, the mortgagee of certain property, styling himself the owner of it, mortgaged it to *S*. In 1875 *M* became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against *M*, and *A* purchased it. *S* subsequently sued *M* and *A* to enforce the mortgage of such

* Second Appeal No. 1168 of 1880, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 4th August, 1880, reversing a decree of Maulvi Ain-ud-din, Munsif of Belari, dated the 21st April, 1880.

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property to him by *M*. Held that, inasmuch as, if *S* had at any time sued *M* to enforce such mortgage after he had become the owner of the mortgaged property, and before *A* had purchased it, *M* would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and *A* had purchased with a knowledge of the facts, after *M* had become the owner, *A* was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to *S*'s claim.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan, Munshi Hanuman Prasad, and Mr. Simeon, for the appellant.

Pandit Bishambhar Nath and Mir Zahur Husain, for the respondent.

The judgment of the High Court (SPANKIE, J., and TYRBELL, J.) was delivered by

SPANKIE, J.—The facts of the case are not disputed. On the 8th January, 1868, Habib-un-nissa executed a deed of mortgage for Rs. 3,400 in favour of Moti Ram, Sobha Ram, and Oheda Lal. In 1871 Moti Ram executed a deed of mortgage of half the property covered by the first mortgage in favour of the plaintiff Seva Ram. On the 11th April, 1875, Habib-un-nissa sold the property included in the mortgage-deed of 1868 to Moti Ram and the others named therein. The plaintiff now sues to recover the money due to him by enforcement of the hypothecation of the mortgaged estate as against the mortgagors Moti Ram and Kanahia Lal, and Ali Bakhsh, auction-purchaser of the mortgaged estate in 1877 in execution of a decree against Moti Ram. The auction-purchaser contends that in 1871, when Moti Ram mortgaged the property to plaintiff, it was not his to mortgage, as he did not become owner of it until the 11th April, 1875; consequently the hypothecation could not be enforced against the estate, which was free from incumbrance when he (Ali Bakhsh) purchased it. There is no question as to the contents of the deed of the 3rd December, 1871. It hypothecates the two and a half biswas zamindari and malguzari property of Moti Ram as security for the payment of the money due on the bond. The Munsif decreed the claim, finding there had been full consideration given under the deed of the 3rd December, 1871, and

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that Ali Bakhsh was fully aware of the real circumstances of the case, and had himself produced in Court the deed of sale of the 11th April, 1875, in favour of Moti Ram. The Judge in appeal has reversed the decision and decree of the Munsif, finding that Moti Ram did not mortgage his mortgage rights, and that he had no intention of doing so, but that he had actually mortgaged to plaintiff that in which he had no legal estate : his act must be judged by the terms he used to describe it in the mortgage-deed: the Judge also held that, after Moti Ram had acquired a proprietary interest in the estate, the plaintiff should have taken steps to compel him to execute a valid mortgage; as he had not done so, the transaction of the 3rd December, 1871, was invalid, and the auction-purchaser must be regarded as having bought the property unincumbered by the mortgage of 1871. There is an addition to the judgment, dated the day after it was delivered, headed "*post scriptum*" in which the lower appellate Court notes that both plaintiff and defendant had given consideration for their respective interests in Moti Ram's property : their equities were so far equal, but Seva Ram was prior in date, and he might claim to take precedence of the auction-purchaser ; but the auction-purchaser might reply that he would not have bought the property if he had known that plaintiff claimed to have a mortgage lien upon it, and that plaintiff should have given him notice. It is urged in appeal that, as Moti Ram had an interest in the property mortgaged to Seva Ram, and subsequently acquired full proprietary right in the property, it cannot be held free from appellant's lien : the Judge had misunderstood the appellant's mortgage-deed.

It appears to us that no suspicion of any fraud is attached to the transaction of the 3rd December, 1871, and indeed none is alleged by Ali Bakhsh the auction-purchaser. The lower appellate Court admits that full consideration was given by plaintiff. Moti Ram himself admitted the justice of the claim, and the first Court found that the auction-purchaser was quite aware of the real circumstances of the case, when he purchased the property in 1877, and that he had himself produced the deed showing the subsequent title of Moti Ram as owner. In his written statement Ali Bakhsh declares that he himself lent the money to Moti Ram

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for the purpose of buying the property, and he himself was the decree-holder against, as well as the purchaser of, the property of Moti Ram. It is certain that in his grounds of appeal to the Judge the auction-purchaser did not take exception to the Munsif's finding in this respect, i.e., as to his knowledge of the real state of the case, when he purchased the property; and therefore the Judge's remark that Ali Bakhsh was a purchaser without notice has no force, even if want of notice could be pleaded in this instance, which is not the case. Moreover, the Judge cannot be said to find that Ali Bakhsh had no notice. There is no such finding in his judgment of the 3rd August. It is in the postscript of the 4th August assumed that Ali Bakhsh may not have known the true state of the case. The main question is, could Seva Ram have enforced the hypothecation against Moti Ram, at any time before the purchase of Ali Bakhsh, but after Moti Ram had acquired full proprietary interest? We think that he could have done so, and that Moti Ram would have been estopped from pleading anything contrary to the terms of the deed. As between the parties the recital in the deed could not be denied. It was clear, distinct, and definite; and if after Moti Ram had acquired the full legal estate, he had by private sale conveyed the same to Ali Bakhsh, the latter, claiming under him, would have been also estopped from setting up Moti Ram's conveyance to him as against Moti Ram's deed to Seva Ram, which expressly recites that the zamindari and the malguzari estate is mortgaged, and no reference whatever is made to the mortgage right. There being no fraud—it also being found that Ali Bakhsh was aware of the true state of the property—we hold that he, having purchased two years after Moti Ram had acquired the full proprietary estate, cannot by virtue of his auction-purchase claim to hold the property as if it was not subject to the plaintiff's mortgage. With this view of the case we decree the appeal, reverse the decision of the lower appellate Court, and restore the decree of the first Court with costs.

Appeal allowed.

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

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May 17.

CHANDAN KUAR (SURETY) v. TIRKHA RAM (DECREE-HOLDER).*

*Execution of decree against surety—Payment of decree by instalments—Act X of 1877
(Civil Procedure Code), ss. 210, 253.*

A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale and applied for its postponement, producing a surety and a bond in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against such surety.

Held that, inasmuch as the decree-holder had not been a party to the proceedings of the sale-officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of s. 210 of Act X of 1877 were not applicable and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877.

THE Munsif of Kasganj, by whom a decree for money held by the respondent against one Behari Lal had been made, ordered that certain land paying revenue to Government belonging to the judgment-debtor should be sold in execution of the decree. On the 16th January, 1878, a few days before the day fixed for the sale, the judgment-debtor applied to the revenue officer appointed to conduct the sale to obtain its postponement, producing a surety, Chandan Kuar, who had executed a bond in which she promised to pay the amount of the decree, Rs. 400, within one year, if the judgment-debtor did not pay it within that period. The decree-holder was not privy to this arrangement. The revenue officer appointed to conduct the sale forwarded a proceeding to the District Judge, dated the 18th January, together with a copy of the bond, in

* Second Appeal, No. 75 of 1880, from an order of G. L. Lang, Esq., Judge of Aligarh, dated the 3rd September, 1880, reversing a decree of Maulvi Ruh-ul-la, Munsif of Kasganj, dated the 20th May, 1880.

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which he stated that the sale of the property in question was objectionable, as it was ancestral, and that the judgment-debtor's surety had promised to pay the amount of the decree by instalments in one year, and requested the District Judge to sanction the arrangement and order the postponement of the sale. On the following day, the 19th January, the District Judge ordered the sale to be postponed, and forwarded the papers to the Munsif for the issue of orders regarding the arrangement. On the 5th February, 1878, the Munsif ordered that the amount of the decree should be paid by instalments within one year. The judgment-debtor failed to pay the amount of the decree within the time fixed, whereupon the decree-holder applied for execution of the decree against certain property belonging to the surety. The surety objected to the execution of the decree against her. The Court of first instance allowed the objection on the ground that the judgment-debtor possessed immoveable property of his own, and that, so long as this was the case, the decree ought not to be executed against the property of the surety. On appeal by the decree-holder, when the surety contended that the decree could not lawfully be executed against her, the lower appellate Court held that the decree might be executed against her under s. 253 of Act X of 1877. It so held on the ground that the order made by the Munsif for payment of the decree by instalments amounted to an alteration of the decree, and that the surety had rendered herself liable before the making of such alteration. The surety appealed to the High Court, contending that the provisions of s. 253 of Act X of 1877 were not applicable under the circumstances of the case.

Pandit *Nand Lal*, for the appellant.

The respondent did not appear.

The judgment of the Court (SPANKIE, J., and TYRRELL, J.) was delivered by

SPANKIE, J.—The pleas must be admitted. We have examined the decision of this Court referred to by the Judge,—Misc. S. A. No. 74 of 1877, decided 17th January, 1878 (1). But it states none of the facts, and we cannot therefore say on what it proceeds. It is no guide to us in this matter. On the facts which appear in

(1) Unreported.

the case before us the sale was improperly stopped at the request of the judgment-debtor, who produced a surety, who executed a security-bond promising to pay Rs. 400 within one year in the event of the judgment-debtor not paying the same. The decree-holder was no party to the arrangement. The Deputy Collector, staying the sale, asked the Judge to sanction the proposed arrangement. The Judge ordered postponement of the sale, sending in the security-bond and papers to the Munsif, who had passed the decree. That officer, however, neither accepted nor disallowed the surety bond, but fixed instalments to be paid under the decree. The surety-bond proposed no instalments, but simply stipulated that the judgment-debtor should pay Rs. 400, the amount of the decree, within a year, and in case of default the surety should pay it. The action of the Deputy Collector, of the Judge, and of the Munsif seems to have been irregular. With this, however, we are not now concerned. The decree-holder is now attempting to enforce the surety bond against the surety in execution of decree against the judgment-debtor under s. 253. We are of opinion that the decree-holder cannot succeed in this attempt. S. 210 of the Code does not apply to this case. The decree-holder and the judgment-debtor have not, on the face of these proceedings, appeared before the Court, and prayed the Munsif to fix instalments for the payment of the amount of the decree, on condition of security being given for this purpose. The decree-holder was no party to the arrangement which was made by the Deputy Collector, and forced upon the Munsif by the Judge, and, as already pointed out, the suretyship is not for the payment of the decree by instalments, but the bond covenants to satisfy the entire amount of the decree, if the judgment-debtor does not discharge it within one year. Again, we do not understand that the surety has made himself a party to the suit by engaging to pay the debt in one year, if the judgment-debtor does not. He has incurred a liability, but not one that can be enforced summarily in the execution proceedings against the judgment-debtor. He has certainly not become liable under the provisions of s. 253, which refers to suretyship before the passing of a decree. The Full Bench decision of this Court—*Bans Bahadur Singh v. Mughla Begam* (1)—in which the majority of the Court

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(1) I. L. R. 2 All. 604.

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extends the section to decrees of the Judicial Committee of the Privy Council, and apparently to all suretyships for the due performance of appellate decrees, does not go further but stops there. The section would be quite remodelled if we were to hold that under it a surety-bond, executed at the moment of sale, promising to satisfy the decree in one year, if the judgment-debtor did not do so, could be summarily enforced by the execution of the original decree against the surety, in the same manner as a decree may be executed against a defendant. We reverse the order of the Judge and decree the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KHUB CHAND (DEFENDANT) v. NARAIN SINGH (PLAINTIFF).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13—"Same parties."

G sold an estate nominally to the minor son of *K*, but in reality to *K*. *K* brought a suit in his minor son's name against *N*, the mortgagee of such estate, to redeem the same. *N* set up as a defence to such suit that such sale was invalid under Hindu law, as such estate was a share of certain undivided property of which he was a co-sharer and had been made without his consent. It was finally decided in that suit that such estate was a share of such undivided property and not the separate property of *G*, and that such sale was invalid, having been made without the consent of *N* a co-sharer of such undivided property. *G* subsequently redeemed such estate, and having done so sold it a second time to *K*. *N* thereupon sued *K* to set aside such sale on the same ground as that on which he had defended the former suit. *Held* that the issue in such suit whether such estate was a share of undivided property or the separate property of *G* was *res judicata*, inasmuch as *K*, though not in name, yet in fact was a "party" to the former suit in which such issue was raised and finally decided.

THE plaintiff in this suit, Narain Singh, and one Ganesh Singh were the proprietors in equal shares of a two biswas share of a certain village. Ganesh Singh's one biswa share of the estate was mortgaged to Narain Singh. He sold such share, nominally to Gajadhar Singh, the minor son of the defendant in this suit, Khub Chand, but in reality to Khub Chand. Khub Chand brought a suit in his minor son's name against Narain Singh for the redemption of such share. Narain Singh defended that suit on the ground that such sale was

* Second Appeal, No. 992 of 1880, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 22nd June, 1880, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 25th August, 1879.

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invalid under Hindu law, the estate being joint undivided property, and such sale having been made without his consent. On the 20th December, 1873, the appellate Court dismissed that suit, allowing the defence set up to it by Narain Singh. Khub Chand subsequently sued Ganesh Singh for a refund of the purchase-money, and obtained a decree on the 14th February, 1874. Ganesh Singh subsequently sued Narain Singh for possession of his one biswa share of the estate, alleging that the mortgage had been redeemed, and on the 22nd April, 1875, obtained a decree which became final. On the 12th October, 1878, Ganesh Singh again sold his one biswa share of the estate to Khub Chand. Thereupon Narain Singh instituted the present suit against Khub Chand to set aside such sale on the same ground as that on which he had defended the former suit, viz., that the estate was joint undivided property, and the alienation of his moiety thereof by Ganesh Singh, without the plaintiff's consent, was invalid under Hindu law. The defendant set up as defence to the suit that the estate was not a joint undivided estate but had been partitioned, and such alienation was therefore not invalid under Hindu law. Both the lower Courts held that, as the question whether the estate was a joint undivided one and an alienation of his share by Ganesh Singh without the consent of his co-sharer was invalid under Hindu law had been heard and finally determined in the former suit, in 1873, such question was *res judicata*; and gave the plaintiff a decree setting aside the second sale.

On second appeal the defendant contended that the question of the validity of the second sale was not *res judicata*, with reference to the decision in the former suit in 1873; and that there had been a partition since the date of that decision.

Munshi Hanuman Prasad and Pandit Bishambhar Nath, for the appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Pandit Ajudhia Nath, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYBRELL, J.) was delivered by

STRAIGHT, J.—We are of opinion that the principle of *res judicata* is applicable to the present case, and that the lower Courts

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have properly held, subject to the determination of the effect of the decree subsequently obtained by Ganesh against the respondent, that the appellant was bound by the decision of 1873. It has been distinctly found both by the Subordinate Judge and the Judge that, in the suit which was brought in the name of Gajadhar Singh, minor son of the defendant-appellant, in that year, the appellant was the real plaintiff, and that the sale-deed of the one biswa by Ganesh to Gajadhar Singh, while ostensibly professing to be made to the minor, was actually executed to the appellant, who himself found the consideration. The transaction therefore being *be-nami* in respect of Gajadhar Singh, it follows that he was a mere dummy in the subsequent suit for redemption instituted against the respondent, and we must hold that, though not in name, yet in fact, the appellant was a "party" to that litigation. That the joint ownership by the respondent and Ganesh of the two biswas, one of which has been sold to the appellant by the sale-deed of the 12th October, 1878, was directly raised and determined is obvious, and the decree of the 20th December, 1873, finally concluded the point as between the appellant and the respondent to that date.

The only further question that then arises is whether there was any subsequent partition; and the sole ground upon which it is urged that there was is the circumstance that Ganesh brought a suit for redemption of the one biswa mortgaged to the respondent, and got a decree for it in 1875. We cannot concur in the argument of the appellant's pleader that this is conclusive evidence of a separation of estate. The mortgage transaction was by one joint owner to the other, and the mortgage being admittedly made with the consent of the co-sharer, the title of the mortgagor did not really come into question. On the other hand, it is clear that the respondent has always resisted any alienation or assertion of a separate right by Ganesh to a divided share of the two biswas. We think, therefore, that the lower Courts have rightly decided the case, and that the sale-deed of the 12th October, 1878, has been properly held invalid and of no effect in consequence of the incapacity of Ganesh to execute it without the consent of his co-sharer. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1881
May 20.

ABDUL HAKIM (PLAINTIFF) v. TEJ CHANDAR MUKARJI (DEFENDANT).*

Defamation—Statements in judicial proceeding—Good faith—Privileged communication.

The law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code and not the English law of libel and slander.

Held, therefore, that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding.

It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith.

THE plaintiff in this suit claimed compensation for injury to his reputation, on the ground that the defendant had used false and malicious expressions concerning him in a petition, dated the 17th September, 1879, filed in the Criminal Court. It appeared that one Kashi Pandey had instituted criminal proceedings against the defendant, charging him with having forced his way into his house and used threatening language. The hearing of this charge against the defendant was fixed for the 19th September, 1879. On the 17th September, 1879, the defendant preferred a petition to the Magistrate trying the case, by way of defence to the charge made against him, in which he made statements to the effect that the plaintiff had caused the criminal proceedings to be instituted against him in order to extort money. The defendant set up as a defence to this suit that the expressions used by him in the petition of the 17th September, 1879, even if defamatory, were privileged, inasmuch as they were used in a petition preferred in a judicial proceeding, and inasmuch as they were used in good faith for the protection of his own interests. The Court of first instance disallowed this defence, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held, following certain

* Second Appeal, No. 1252 of 1880, from a decree of S. M. Moens, Esq., Judge of Mirzapur, dated the 8th June, 1880, modifying a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 11th February, 1880.

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English cases (1), that the expressions used by the defendant concerning the plaintiff in the petition of the 17th September, 1879, were not actionable, even though they were false, scandalous, and malicious, inasmuch as they were used in a petition preferred in a judicial proceeding and were pertinent to the occasion. It also decided that such expressions were not actionable, inasmuch as they were used in good faith for the protection of the defendant's interests; and it dismissed the suit.

The plaintiff appealed to the High Court, contending that, according to the law of India, the expressions used in the petition of the 17th September, 1879, were not privileged merely because they had been used in a petition preferred in a judicial proceeding and were not irrelevant; and that such expressions were not used in good faith, and were therefore not privileged.

Pandit *Ajudhia Nath*, for the appellant.

Mr. *Hill* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—We are by no means prepared to accept in its integrity the view pressed upon us by the learned counsel for the defendant-respondent, that the defamatory matter complained of by the plaintiff-appellant is absolutely privileged, because it was contained in a petition filed in the Magistrate's Court, in respect of a case pending therein. No doubt the principles enunciated in numerous English decisions bearing upon the point strongly favour his contention. But we do not consider that we are arbitrarily bound to follow those precedents, or to adopt them as conclusively applicable to all libel or slander suits in our Courts. The state of society and the condition of things in the two countries is wholly dissimilar, and to lay it down as an inflexible rule that any false and malicious statements, no matter how defamatory, may be made with impunity if only embodied in a petition filed in reference to some pending case, could not but entail the most mischievous

(1) *Henderson v. Broomhead*, 28 L. J., Exch. 360; *Revis v. Smith*, 25 L. J.,

C. F., 195; *Hodgson v. Scarlett*, 1 B. and A., 232.

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consequences. At any rate it seems to us that when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which determination of suits like the present should be regulated. Although the provisions of the Penal Code with regard to defamation are applicable to criminal charges, the principles therein embodied are well adapted to supply the tests by which the liability or otherwise of defendants to civil suits should be decided. It is difficult to see why, when no distinction is drawn by the criminal law between written and spoken defamatory matter, and both are held equally punishable, that an absolute privilege should be accorded a defendant to protect him from pecuniary liability which would not avail him in the Criminal Court. We therefore do not think that the doctrine of absolute privilege propounded by the respondent's counsel should be unreservedly followed in our Courts, and so far as the Judge has applied it in determining the present case, his judgment appears to us to be open to objection. Fortunately, however, he dealt with the appeal before him from another aspect which we consider the right one, and has recorded a sufficient finding which will justify us in upholding his decision. The true test by which the liability of the defendant had to be tried was, did he in his petition of 17th September, 1879, make the imputations upon the plaintiff in good faith, that is with due care and caution, for the protection of his own interests? This the Judge has answered by finding that "the evidence in the case is sufficient to show that the defendant had adequate reasons for supposing that Abdul Hakim was at the bottom of the charges against him: these charges were obviously and clearly made for the purpose of extorting money." Then after recapitulating some of the evidence, he goes on to say: "This independently of other evidence in the case is enough to show that Tej Chandar Mukarji was not acting recklessly or groundlessly in making the statements contained in his petition." We cannot say, as asked by the appellant's pleader, that there was no evidence to justify the Judge in coming to this conclusion. On the contrary, there certainly was some from which he might not unreasonably draw the inferences at which he arrived. It is not essential that, before a person can be held entitled to the privilege of having made a

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statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true, though it is obvious that, according as it is more or less true or false, the question of his good faith or otherwise, must be determined. If, having regard to certain facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his *bona fides*. This the Judge holds the defendant in the present suit to have done, and with his finding upon that head we see no ground to interfere. The appeal must be dismissed with costs.

Appeal dismissed.

1881
May 21.

Before Mr. Justice Spankie and Mr. Justice Straight.

ABHAI PANDEY AND OTHERS (PLAINTIFFS) v. BHAGWAN PANDEY
AND OTHERS (DEFENDANTS).*

Partition of Mahál by arbitration—Sir-Land—Act XIX of 1873 (N.-W. P. Land-Revenue Act), s. 125—Jurisdiction of Civil Courts.

When the co-sharers of a mahál agree to have such mahál partitioned by an arbitrator, they must be understood to agree to the arrangements made by such arbitrator, and if he provides by his award that the sir-land of one co-sharer that falls by lot into the share of another co-sharer should be surrendered, that land must be given up by the co-sharer who has hitherto cultivated it. Such co-sharer's consent to such arrangement must be understood to have been given when he agreed to arbitration. S. 125 of Act XIX of 1873 must not be regarded as empowering a co-sharer, who has once given his consent to surrender the cultivation, to continue to cultivate the land against the will of the co-sharer who has become the owner of it by partition.

An agreement to refer to arbitration the partition of a mahál provided that, if sir-land belonging to one co-sharer were assigned to another co-sharer, the co-sharer to whom the same belonged should surrender it to the co-sharer to whom it might be assigned. The arbitrator assigned certain sir-land belonging to the defendants in this suit to the plaintiffs. The partition was concluded according to the terms of the award. The defendants refused to surrender such land to the plaintiffs. The plaintiffs distrained the produce of such land, alleging that it was held by certain persons as their tenants and arrears of rent were due. The defendants thereupon sued the plaintiffs and such persons in the Revenue Court, claiming

* Second Appeal No. 1275 of 1880, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 14th September, 1880, reversing a decree of Munshi Man Mohan Lal, Munsif of Ballia, dated the 13th July, 1880.

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such produce as their own. The Revenue Court held that such distress was illegal, as such land was in the possession and cultivation of the defendants as occupancy-tenants under s. 125 of Act XIX of 1873. The plaintiffs subsequently sued the defendants in the Civil Court for possession of such land, basing such suit on the partition proceedings. *Held* that the decision of the Revenue Court did not debar the Civil Courts from determining the rights of the parties under the partition, and such suit was cognizable in the Civil Courts.

THIS was a suit for possession of certain land situate in a village called Nasirabad, and for the mesne profits of such land. The co-sharers of the village including the parties to this suit had agreed that it should be partitioned by arbitration. The agreement to refer to arbitration provided that, if any sîr-land belonging to one co-sharer were assigned to another co-sharer, the co-sharer to whom the same belonged should surrender it to the co-sharer to whom it might be assigned. The arbitrator who effected the partition assigned the land in suit, which was sîr-land belonging to the defendants, to the plaintiffs. Before the partition was concluded the defendants preferred a petition to the revenue officer conducting the partition objecting to the award in so far as it assigned such sîr-land to the plaintiffs, urging that if effect were given to the award in this respect they would be deprived of their rights under s. 125 of Act XIX of 1873. The plaintiffs, by way of an answer to this petition, preferred another in which they stated that the rights of the defendants under that section would in no way be endangered by effect being given to the award. The partition was eventually effected in accordance with the terms of the award. The defendants did not surrender the land in suit but retained possession of it. The plaintiffs subsequently to the partition distrained the produce on a portion of the land in suit, alleging that it was held by certain persons as their sub-tenants and that arrears of rent were due. The defendants thereupon instituted a suit in the Revenue Court against the plaintiffs and such persons, claiming the property which had been distrained as their own. The Revenue Court decided that the distress was illegal, as the land was in the possession and cultivation of the defendants as occupancy-tenants under s. 125 of Act XIX of 1873. The plaintiffs subsequently brought the present suit against the defendants in the Munsif's Court. The defendants set up as a defence to the suit that the Revenue Court

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had decided that they were the occupancy-tenants of the land under s. 125 of Act XVIII of 1873, and such decision had become final, and that, being occupancy-tenants of the land, the claim to eject them was not cognizable in the Civil Courts. The Munsif, having regard to the agreement to refer to arbitration and the award, disallowed this defence, and gave the plaintiffs a decree. On appeal by the defendants the District Court, having regard to the petition of the plaintiffs and the decision of the Revenue Court mentioned above, held that the defendants must be retained in possession of the land, and could not be ejected except for arrears of rent, and dismissed the suit.

On appeal by the plaintiffs to the High Court it was contended on their behalf that they were entitled to the land in suit under the agreement to refer to arbitration and the award; that the petition of the plaintiffs contained nothing which varied the terms of that agreement; and that the decision of the Revenue Court did not preclude the determination by the Civil Courts of the title of the plaintiffs to the land.

Pandit *Ajudhia Nath* and *Lala Lalta Prasad*, for the appellants.

Mr. *Conlan* and *Munshi Sukh Ram*, for the respondents.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

SPANKIE, J.—There is no dispute as to the partition and the award by which it was made, nor are the terms of the award questioned. It is equally beyond dispute that the parties agreed to the arbitration. There is in the award a clear provision that, where land under the cultivation of one co-sharer fell into the lot of another, the latter should have possession. When the partition was effected formal possession was given under it on the 28th October, 1877. But in reality the defendants did not quit the land in dispute but continued to cultivate it. The petition to which the Judge refers does not affect the terms of the award, nor contain any provision that would deprive the plaintiffs of their right to enforce the terms of the award. The parties are bound by that award. In point of fact the provision as to possession is not opposed

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to, but is consistent with, s. 125 of the Land-Revenue Act. That section provides that no sîr-land belonging to any co-sharer shall be included in the mahâl assigned on partition to another co-sharer, unless with the consent of the co-sharer who cultivates it, or unless the partition cannot otherwise be conveniently carried out. When co-sharers agree to have the partition made by an arbitrator they must be understood to agree to the arrangements made by the arbitrator, and if he provides by his award that the sîr-land of one co-sharer that falls by lot into the share of another co-sharer should be surrendered, that land must be given up by the co-sharer who has hitherto cultivated it. His consent to the arrangement must be understood to have been given when he agreed to arbitration and accepted the award. The second paragraph of s. 125 declares that if any sîr-land be so included, and after partition such co-sharer continue to cultivate it, he shall be an occupancy-tenant of such land, and his rent shall be fixed by order of the Collector. But the section must not be regarded as empowering a co-sharer, who has once given his consent to surrender the cultivation, to continue to cultivate the land against the will of the co-sharer who has become the owner of it by partition. In Act XIX of 1863 no provision was made in regard to sîr-land. It would seem that, in order to remove any doubt as to the position of co-sharers who continued (as tenants) to cultivate the land that had been held by them as sîr, s. 125 of the Land-Revenue Act defines their position to be that of occupancy-tenants. They are placed in a position resembling that of the ex-proprietary tenants referred to in s. 7 of Act XVIII of 1873. But the first paragraph of s. 125 of the Land-Revenue Act contemplates and foresees that occasions may arise when a co-sharer is willing to surrender his right of cultivation of the land hitherto owned by him. If the Revenue Court in the distress suit found the defendants continuing to cultivate their sîr-land, it assumed that they occupied the position assigned to such persons in the second paragraph of s. 125 of the Act. But that does not affect the jurisdiction of the Civil Court in dealing with the rights of the parties. The plaintiffs are not asking the Court to interfere with the distribution of land by partition, but are practically seeking to enforce the terms of the partition in regard to themselves as against the defendants who are trying to avoid them. I have

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examined the case cited by Munshi Sukh Ram [Second Appeal, No. 226 of 1878 (1)] and I do not find that it is at all in point. We decree the appeal and reverse the decree of the lower appellate Court, restoring that of the Munsif with costs.

Appeal allowed.

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May 26.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BAHADUR (PLAINTIFF) v. NAWAB JAN (DEFENDANT)*

Suit for redemption of Mortgage—Valuation of suit—Jurisdiction.

The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right, *quæ* such share, was under Rs. 1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding Rs. 1,000 was due, had been tacked to the mortgage, and that until such sum had been satisfied the plaintiff could not recover possession of his share. *Held*, on the question whether the Munsif had jurisdiction, that the value of the subject-matter of the suit was the value of the mortgagee's right, *quæ* the plaintiff's share; and as the value of such right did not exceed Rs. 1,000 even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognizable in the Munsif's Court. The principle laid down in *Gobind Singh v. Kallu* (2) followed.

THE plaintiff in this suit claimed possession of a one-fifth share of a certain village, which had been mortgaged on the 9th January, 1816, by its then proprietors, for Rs. 325 for a term of six years, the mortgagee obtaining possession. The suit was instituted in the Munsif's Court, being valued at Rs. 65, one-fifth of the mortgage-money. The plaintiff, who represented the mortgagors as regards the share in suit, alleged that the entire mortgage-debt had been satisfied out of the usufruct. The defendant in the suit, who derived his title from the mortgagee, set up as a defence to it, amongst other things, that the mortgagors had on the 2nd August, 1824, given the mortgagee a bond for Rs. 682, which had been tacked to the mortgage of 1816, and the principal amount and interest due on this bond, *viz.*, Rs. 4,695-10-0, must be satisfied before the plaintiff could obtain possession of the share in suit.

* Second Appeal, No. 1251 of 1880, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 31st August, 1880, reversing a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 17th July, 1880.

(1) Unreported.

(2) L. L. R., 2 All. 778.

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The Munsif decided the issue to which this defence gave rise in the plaintiff's favour, holding, amongst other things, that the bond of the 2nd August, 1824, was not proved to be a genuine and valid instrument; and it gave the plaintiff a decree for the share in suit. On appeal by the defendant the lower appellate Court held that this defence ousted the jurisdiction of the Munsif, and it was not competent for him to determine the issue arising thereout, as it involved a sum exceeding Rs. 1,000, his pecuniary jurisdiction; and it made an order returning the plaint to the plaintiff that it might be presented to the proper Court.

On second appeal by the plaintiff it was contended on his behalf that the suit was cognizable in the Munsif's Court.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J. and TYRBELL, J.) was delivered by

STRAIGHT, J.—We think that the plea in appeal has force, and that the Judge acted erroneously in returning the plaint on the ground that the Munsif had entertained the suit without jurisdiction. The plaintiff-appellant came into Court upon the allegation that the mortgage of 1816 had been satisfied out of the usufruct, and that, as the representative by purchase of the rights of one of the mortgagors, he was entitled to possession of so much of the mortgaged property as belonged to his share. The substantial defence put forward by the defendants-respondents was that a bond for Rs. 682, dated the 2nd August, 1824, had been tacked to the mortgage of 1816, and that before the plaintiff could obtain possession of the property, the principal sum due under this instrument, together with interest, amounting in all to Rs. 4,695-10-0, must be satisfied. The Munsif framed an issue upon this point, and decided it in favour of the plaintiff. In appeal the Judge was of opinion that the contention set up by the defendants ousted the jurisdiction of the Court of first instance, and that it was not competent for him to determine such an issue, involving as it did a sum above the amount of Rs. 1,000. Assuming it to be correct, as stated by the pleader for the plaintiff-appellant, that the integrity of the mortgage had

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been broken in consequence of the mortgagees having purchased the rights of some of the mortgagors, and that a suit by one of the mortgagors for possession of his share was properly maintainable, the value of the subject-matter of the suit was the value of that portion of the mortgagee's rights which the plaintiff alleged had been redeemed. Even had it been held that the property charged by the mortgage of 1816 had been further incumbered with the bond of 1824, the amount the plaintiff could have been ordered to pay would not have exceeded the extent of the one-fifth mortgagor's share in his hands, that is to say, a less sum than Rs. 1,000. As between plaintiff and defendants the value of the subject-matter in issue was therefore within the Munsif's jurisdiction, and he rightly entertained and disposed of the suit. We may add that this point has already been made the basis of a considered judgment of this Court—*Gobind Singh v. Kallu* (1)—in which previous rulings were considered. We are therefore of opinion that the Judge should have heard the appeal to him, and as he disposed of it upon a preliminary point, we remand the case to him under s. 562 of the Civil Procedure Code for trial on the merits.

Cause remanded.

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May 26.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAKUND AND OTHERS (DEFENDANTS) v. BAHORI LAL (PLAINTIFF).*

Right to begin—Burden of proof—Irregularity not affecting merits—Powers of appellate Court—Act X of 1877 (Civil Procedure Code), s. 578.

The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment, and the Court of first instance, without calling on the defendants to establish their defence,

* Second Appeal, No. 1259 of 1880, from a decree of G. E. Knox, Esq., Judge of Banda, dated the 26th August, 1880, reversing a decree of Pandit Ram Narain, Munsif of Hamirpur, dated the 15th July, 1880.

(1) I. L. R., 2 All. 778.

dismissed the suit. The lower appellate Court held that the defendants should have been required to begin under the circumstances, and reversed the decree of the Court of first instance, and gave the plaintiff a decree.

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Held that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisions of s. 578 of Act X of 1877, whether it was competent for the lower appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower appellate Court should not have ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it.

THE plaintiff in this suit claimed Rs. 85, principal, and Rs. 38-13-0, interest, total Rs. 123-13-0, on a bond dated the 28th August, 1878, purporting to be executed by the father of the defendants. This bond recited that the obligor had received the consideration for it. The defendants admitted that their father had executed the bond, but denied that he had received any consideration for it, alleging that the plaintiff had promised at the time and place of execution of the bond to pay the consideration to the obligor when the latter returned to his village, but that he had not done so. The plaintiff called the two marginal witnesses to the bond and a third person to prove that the obligor had received the consideration at the time of execution of the bond. These witnesses deposed that the money was not paid to the obligor at the time of execution, and one of them further deposed that the plaintiff had promised to pay the obligor the money at his home, but that he had not done so. The defendants did not produce any evidence in support of their defence to the suit. The Court of first instance, having regard to the evidence of the plaintiff's witnesses, held that "the plaintiff's claim was not proved even from the evidence of his own witnesses," and dismissed it. On appeal by the plaintiff the lower appellate Court held that the party to begin in a case of this nature was the defendant, and that the burden of proof in this case lay on the defendants, and they had not discharged it, and it gave the plaintiff a decree for the amount claimed by him.

On second appeal by the defendants it was contended on their behalf that, under the circumstances, the burden of proving that the

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consideration for the bond had been paid lay on the plaintiff, and as he had failed to prove this fact, the Court of first instance had properly dismissed his suit.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRELL, J.,) was delivered by

STRAIGHT, J.—The plaintiff-respondent sued in the Munsif's Court to recover Rs. 123-13-0, principal and interest, due upon a bond dated 28th August, 1878, by enforcement of lien against 94 bighas 16 biswas hypothecated. The defendants-appellants admitted the execution of the instrument, but denied that they had received any consideration, and the *onus* was therefore upon them to establish their plea, and they should have been called upon to begin. It seems, however, that the Munsif did not adopt this course, and the pleader of the plaintiff proceeded to call witnesses in support of his client's case, mainly, we presume, for the purpose of meeting the defence set up on the other side. Two of the marginal witnesses and one other person deposed that the money recited in the bond as having been paid was not paid either at the time of or before its execution, but that, on the contrary, the plaintiff promised it should be paid upon the return of the parties to the village. The effect of this evidence therefore was to negative the conclusive presumption otherwise to be drawn from the terms of the bond, that the consideration had been satisfied by the obligee at or before execution, and to indicate a payment of it at some other time. The plaintiff's pleader, apparently disconcerted by his own witnesses thus playing him false, did not bring forward any further proof to establish any such payment, and without calling upon the defendants to substantiate their plea, the Munsif dismissed the claim. The Judge, in appeal, holding that the defendants should have been required to begin, reversed this decision, and decreed in favour of the plaintiff. The somewhat startling effect of this judgment is that, though there is uncontradicted evidence to be found in the record that the presumption of payment to be inferred from the terms of the bond, which would primarily have thrown the

onus upon the defendants, was negatived, yet the Judge has acted as if such presumption were in full force. No doubt the Munsif permitted an irregularity of procedure in allowing the plaintiff's pleader to begin, but having done so, and the witnesses having proved that the consideration had not been paid as admitted by defendants in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent date, paid to the defendants the money alleged to have been lent. Having failed to do this, his suit was properly dismissed by the Munsif. We much doubt whether, having regard to the terms of s. 578 of the Civil Procedure, it was competent for the Judge to reverse the decision of the first Court, but even if it was, he should not have ignored what had taken place there, and should have dealt with the case in appeal in the shape it came to him. We cannot maintain his decision. The plaintiff was rightly held by the Munsif to have failed to prove his case, and the Judge should not have discarded the evidence of the three witnesses called on his behalf. The appeal must therefore be decreed with costs, the decision of the lower appellate Court reversed, and that of the Munsif restored.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HIRA (PLAINTIFF) v. UNAS ALI KHAN (DEFENDANT).*

Pre-emption—Act X of 1877 (Civil Procedure Code), s. 310.

The requirements of s. 310 of Act X of 1877 are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder. That section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. *Tej Singh v. Gobind Singh* (1) followed.

A SHARE of certain undivided immoveable property was put up for sale in execution of a decree, and was knocked down to the plaintiff in this suit. Immediately before the hammer fell to the plaintiff's bid, the defendant in this suit, a co-sharer of such share,

* Second Appeal, No. 1291 of 1880, from a decree of W. Duthoit, Esq., Judge of Shahjahanpur, dated the 3rd September, 1880, reversing a decree of Said Muhammad Munsif of West Budaun, dated the 20th July, 1880.

(1) I. L. R. 2 All. 850.

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who had not been bidding for the property, presented an application in writing to the officer conducting the sale in which he asserted his right of pre-emption as a co-sharer, and offered a sum for the property equal to that bid by the plaintiff. The Court executing the decree having made an order confirming the sale in favour of the defendant, the plaintiff brought the present suit for possession of the property, and to have such order set aside, and the sale confirmed in his own favour, contending that the defendant had not complied with the provisions of s. 310 of Act X. of 1877, not having made a bid for the property, and in consequence the sale had been improperly confirmed in his favour. The Court of first instance allowed this contention, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held that the tender by the defendant, before the hammer fell, of a sum equal to that offered by the highest bidder should be treated as a sufficient compliance with the provisions of s. 310 of Act X. of 1877, and dismissed the suit. The plaintiff appealed to the High Court, again contending that the defendant had not complied with the provisions of that section, and the sale should not have been confirmed in his favour.

Mr. Simeon and Babu Beni Prasad, for the appellant.

Pandit Nand Lal, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRBELL, J.,) was delivered by

STRAIGHT, J.—We think that the Judge was in error in holding that the defendant-respondent satisfied the requirements of s. 310 of the Civil Procedure Code. The words are clear that the co-sharer and the other person must respectively “advance the same sum” at the bidding, and thus contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. This point has already been considered on more than one occasion by Benches of this Court, and in thus deciding it in the present case it is sufficient to say that we recognise the authority of *Tej Singh v. Gobind Singh* (1). The appeal must be decreed with costs.

Appeal allowed.

(1) I. L. R. 2 All. 850.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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May 30.

**KISHEN CHAND (PLAINTIFF) v. THE SECRETARY OF STATE FOR INDIA
IN COUNCIL AND ANOTHER (DEFENDANTS).***

Contract by Government to grant proprietary rights in land—Contract entered into or acts done in the exercise of sovereign powers.

The plaintiff in this suit, alleging that the Government had granted him a lease of certain land with the rights of a proprietor, promising to confer on him the proprietary rights in such land if he did certain things; that he had done such things; that the Government had refused to perform such promise and had conferred the proprietary rights in such land on another person, claimed, by virtue of the contract between him and the Government and as against the Government and such person proprietary possession of such land.

Held per SPANKIE, J., that, assuming that the Government had entered into such a contract with the plaintiff as alleged, the suit would not lie, inasmuch as such contract was entered into, and the refusal of the Government to confer the proprietary rights in such land on the plaintiff, and the grant by it of such rights to such person were acts done, in the exercise of sovereign powers.

Held per STUART, C. J., that the Government had entered into the contract alleged by the plaintiff; that the suit would lie, as the Government had not entered into such contract in the exercise of sovereign powers but in the capacity of a private owner; but that the plaintiff's case failed, as he had not performed his part of such contract.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Spankie, J.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the respondents.

The Court (STUART, C. J., and SPANKIE, J.) delivered the following judgments:—

SPANKIE, J.—This was a suit on the part of the plaintiff-appellant under the following circumstances. The plaintiff avers that a certain forest in the district of Hamirpur belonged to the Nawab of Banda, and was preserved for sporting purposes, and known as "Ramna." The Nawab became a rebel, and on the 20th October, 1858, the "Ramna" was confiscated by the Government, and a farming settlement was made of the lands with Thakur Das and Bhoj Raj.

* First Appeal, No. 86 of 1880, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Banda, dated the 22nd April, 1880.

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They failed to fulfil the conditions of their agreement, and the lease was annulled, and the forest was resumed by Government by order dated 19th December, 1861. The plaintiff and one Madari applied on the 12th January, 1862, to the Collector to the effect that "Ramna" was conterminous to their village, and they prayed that the settlement of the lands might be made with them on condition that they paid Rs. 500 as Government revenue yearly, and cleared the forest or rather jungle within one year, and established a village. Should they fail to fulfil these conditions, they offered to pay any fine that the Government might impose upon them, and asked for an early reply to their petition, as it was the season for clearing jungle. Subsequently, when matters had advanced, the plaintiff and Madari on the 12th December, 1862, executed an agreement by which they bound themselves to clear half the jungle from the beginning of 1863 to the close of that year, and to bring it under cultivation, and in 1864 to clear and bring under cultivation the remaining half, excepting 200 bighas, which were to be reserved as pasture-land for cattle. They also bound themselves to locate tenants on the lands in 1863 and 1864 and to establish a village. If they failed to carry out these conditions their right to the enjoyment of proprietary rights would be extinguished, and the Government would be at liberty to annul the agreement and resume the estate. It is important to notice that at the outset of the agreement the plaintiff refers to an application made by him and Madari for a settlement of the proprietary right (*milkiat*) of the land on a *jama* of Rs. 500 yearly. The plaintiff avers that this agreement was accepted by Government, and a farming settlement in proprietary right was made with them on condition that the entire estate, 1,147 bighas 7 biswas *pucka*, with the exception of 200 bighas, was reclaimed within the period of two years. The Government further promised on the 3rd June, 1863, that, if the conditions were fulfilled, the proprietary right was to be conferred upon the farmers at the next settlement. The plaintiff fulfilled the conditions in all respects, and in 1867 the Government allowed him to change the name of the estate or township from mauza Rumna to mauza Kishenpur, and under its new name it was entered in the registers. In 1870, by purchase, the plaintiff became the owner of Madari's interests in the property. On the 24th August, 1878,

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on the report of the Commissioner of Allahabad, the Government transferred the proprietary right to Shaikh Paltu, who obtained possession on the 26th November, 1878. Under these circumstances the plaintiff asks for a declaration that he has fulfilled the contract entered into on the 3rd June, 1863, and that he is entitled to a proprietary settlement. He also prays that he may be placed in proprietary possession by the ejectment of Shaikh Paltu, and that he may receive a decree for the mesne profits from the date of suit to that of possession. The Collector of Banda, on behalf of Government, contends that this is a suit to have a settlement made in plaintiff's favour, and is not cognizable by the Civil Court,—cl. (b), s. 241 of Act XIX of 1873. The plaintiff never applied for a permanent and absolute proprietary right in the mauza, nor was such right ever granted to him. He received merely a farming lease, and he was only entitled to proprietary possession for the stipulated term. The Local Government made no promise whatever to make a proprietary settlement with plaintiff at the next settlement. Assuming that such a promise was made, still he did not clear the jungle, and fulfil his agreement, and was an habitual defaulter, and lost his right to have the settlement renewed. Shaikh Paltu, defendant, relies on the proprietary grant made to himself. He has no concern with any contract entered into with plaintiff. No claim can be maintained against him in this suit, and he was entitled to remain in possession and to his costs.

The Subordinate Judge held (i) that there was no evidence that a promise was distinctly made that the proprietary title should be conferred upon the plaintiff at the next settlement; the wording "may be given" signifies that it was optional with the Government, and not compulsory, to make a settlement; (ii) that the plaintiff had not thoroughly cleared the jungle within the prescribed time; his mismanagement prevented the increase of population; he paid the revenue with difficulty; this was proved by the letters of the Commissioner, Collector, and Settlement Officer; the defendant's witnesses also proved that he made no arrangement within the prescribed time; (iii) that if it be assumed that the Government made a conclusive promise, still the Government had full power in all matters of management of estates, and its subjects cannot bind the Government to any promise or interfere with its

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arrangement—and the Subordinate Judge cites in support of his opinion *Nobin Chunder Dey v. The Secretary of State for India* (1); (iv) that the Government had made the settlement in the exercise of its Sovereign power, and as plaintiff had mismanaged the estate, the Government had power, in order to protect its own revenue, to make the settlement with another person, it being proved that plaintiff was an habitual defaulter; (v.) that cl. (b), s. 241 of Act XIX of 1873 barred the suit. The Subordinate Judge also observed that, with reference to Act IX of 1872, the contract has not yet reached its perfection, but he does not explain in what sense he means this. The lower Court dismissed the claim with costs and one set of pleaders' fees. The plaintiff contends in appeal that the lower Court misunderstands the claim, which is not barred by cl. (b), s. 241 of Act XIX of 1873; the suit was cognizable by the Civil Court; it was established in evidence that the Government promised to confer the proprietary right upon plaintiff and it was bound to carry out the promise, as plaintiff had fulfilled his engagements; the Collector's report was inaccurate; and certain material records, which appellant required, were not sent for by the lower Court, hence there has been an incomplete investigation.

It appears to me that we cannot look into this case on the merits, and give to plaintiff the relief that he claims. It is not solely because s. 241 of Act XIX of 1873 bars the interference of the Civil Courts, which it could only do in so far as the suit includes the claim of any person to be settled with, or affects the validity of any engagement with Government for the payment of revenue, or the amount of revenue, cess or rate to be assessed on any mahál or share of a mahál under the Act or any other Act for the time being in force. It is true that the claim asks for possession as proprietor and for the ejectment of the defendant No. 2, on whom the Government has conferred the proprietary right, and therefore practically may be said to involve the claim of a person to be settled with. But it is also a claim which, if there was any contract at all, and it is very doubtful if there was one, the plaintiff cannot legally enforce against the Secretary of State as representing the Government. The plaintiff complains that he applied for the farming settlement of the

(1) L. L. R., 1 Calc. 11.

property in suit in proprietary right, and that he was invested with the proprietary right, and admitted to engage for the farm of the estate to the end of the current settlement, and that the Local Government promised to grant him full proprietary right at the next settlement, if he fulfilled certain conditions, which conditions he had fulfilled, but the Government has not carried out its promise. But when the plaintiff was allowed by the Local Government to engage for the farming lease, and when the lease was granted to him in proprietary right to the end of the then current settlement, the Government was exercising powers which cannot lawfully be exercised except by a Sovereign or private individual delegated by a Sovereign to exercise them, and therefore no action will lie because for reasons of its own the Government refused to continue any connection with the plaintiff, or to confer upon him the full proprietary right in mauza Kishenpur, the estate in suit. The law on the subject was fully explained and declared in the case of *The Peninsular and Oriental Company v. The Secretary of State*, Bourke's Reports, part vii, p. 166, and at pages 188-189, and the decision of the Supreme Court of the Presidency in that case was followed in *Nobin Chunder Dey v. The Secretary of State for India* (1). This was an appeal from a judgment of Mr. Justice Phear. Referring to the case of *The Peninsular and Oriental Company v. The Secretary of State for India*, that learned Judge observes that it was explained in that suit that the East India Company were not Sovereigns, and therefore could not claim all the exemption of a Sovereign, and they were not the public servants of Government, and therefore did not fall under the principle of the cases with regard to the liabilities of such persons. But they were a company to whom Sovereign powers were delegated, who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government and partly on their own account, which, without any delegation of Sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts so done in the exercise of what are usually termed Sovereign powers, and acts done in the conduct of undertakings which might be carried on by

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private individuals without having such powers delegated to them. When the Government of India was transferred from the East India Company to the Queen-Empress, it was enacted in s. 65, 21 and 22 Vict., c. 106: "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Hence, as Mr. Justice Phear remarks, all suits such as might before the passing of 21 and 22 Vict., c. 106, have been brought against the East India Company, may now be brought against the Secretary of State in Council, and these suits seem to be limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without Sovereign power. The judgment of Mr. Justice Phear was affirmed by Garth, C. J., and Macpherson, J. The settlement of an estate is to be made with the proprietor of the land. This is not a suit in which there are more persons than one, or one set of persons, claiming to be proprietors of the land. The plaintiff is seeking, under an alleged promise and agreement, to compel the Government to confer the full proprietary right of the estate upon himself. He is not seeking to make any particular person or public officer responsible for any act done by such person or public officer. But he is trying to enforce what he avers is a contract against the Government of the country. The act of which he complains was that the Local Government, on the report of the Commissioner of Allahabad, transferred the zamindari rights in the whole of mauza Kishenpur to Shaikh Paltu, defendant No. 2, on the 26th November, 1878. It seems to me that this case is precisely one which is met by what Sir Barnes Peacock, C. J., lays down as the rule in the case cited by Mr. Justice Phear, that "where an act is done or a contract entered into in the exercise of powers usually called Sovereign powers, by which we mean powers which cannot be lawfully exercised except by a Sovereign or private individual delegated by a Sovereign to exercise them, no action will lie." I would therefore dismiss this appeal and affirm the decree of the lower Court with costs.

STUART, C. J.—As I have formed the opinion that the Government are entitled to our judgment on the merits of the case, and that therefore the decree of the lower Court must be affirmed, and the appeal dismissed, it is unnecessary for me to discuss the question whether or not such a contract was made between the plaintiff and the Collector as could be enforced against the Secretary of State. But I may offer one or two remarks on the latter question, so far as it may be supposed to affect the present appeal.

The case of *Nobin Chunder Dey v. The Secretary of State for India* (1) has been referred to. That was a case decided by Mr. Justice Phear on the original side of the Calcutta Court, and whose judgment was affirmed on appeal by Sir Richard Garth, Chief Justice, and Mr. Justice Macpherson. It was there held on the evidence that there was no contract between the plaintiff and the Government, but it was also held by both the Courts that, even assuming there was a contract, the suit was not maintainable, seeing that it was in respect of acts done by the Government in the exercise of Sovereign powers, and it is argued that the relative position of the parties in the present case is the same. I entertain, however, serious doubts whether this contention is well founded. The facts in the Calcutta case had relation to licenses and other purely governmental acts on the part of the excise police authorities, and Mr. Justice Phear was perhaps not wrong in holding that the suit before him would not lie, although it appears to me that he rather strained the argument for the Government to an unnecessary elevation, by laying it down as undoubted legal doctrine that their action in that case was unimpeachable being in virtue of their Sovereign authority. The matter before him was simply one of government control derived from legislative powers which had been conferred on the excise and police themselves, and was therefore beyond the reach of litigation at the suit of private parties. In the present case, however, the facts are not only widely different, but there is a difference also, as I view them, as to their legal quality and character. I think it might be fairly contended that these facts show a kind of dealing between the Government and the plaintiff which amounted to a contract, and one also which

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could, if necessary, be enforced. The negotiations with Kishen Chand and Madari appear to have begun on the 12th December, 1862, when these persons presented a petition to the Collector in which they asked the holding of mauza Rumna, and that the settlement of that property be made with them, subject to the condition of their paying Rs. 500 as Government revenue, and getting the jungle cleared within one year, and establishing the village. This offer was duly reported to the Board of Revenue, who, on the 15th June, 1863, addressed a letter to the Secretary to the Government, North-Western Provinces, the last paragraph of which is as follows: "The Board recommend that the offer of Kishen Chand and Madari for the lease of the village be approved; the proprietary right may be conferred on them at the next settlement." This letter was at once acted upon by the Government, as appears from one addressed by their Under Secretary in which it is stated that, if the conditions offered by Kishen Chand and Madari are fulfilled, proprietary right may be conferred on the farmer at the next settlement. Kishen Chand having in the meantime purchased Madari's rights had become the sole claimant of the right offered and granted. Such was the agreement made with Kishen Chand, and it appears to me that the argument that it fulfilled the legal requisities of a contract, and one which could be judicially enforced *at the suit of the Government*, might be reasonably maintained. And if it could be enforced by the Government *against* Kishen Chand, why could it not be equally enforced *by him* against them if necessary? Again there appears to be nothing in the position of the Government in the matter requiring the exercise of Sovereign rights or powers. The Government simply treats with Kishen Chand as an owner, and it would have been perfectly competent for them as such owner to have transferred their whole rights in the land in question to a third party absolutely, who, it could scarcely be contended, had thereby acquired Sovereign or any other rights beyond those of an ordinary proprietor.

I observe that Mr. Justice Phear in the Calcutta case, to which I have adverted, refers to the remedy by petition of right as in effect showing that a suit of the kind before him would not lie; but a careful examination of the Act of Parliament amending the

law relating to such petitions, 23 and 24 Vict., c. 34, will show that proceedings against the Crown in England, even where there is a legitimate case for the remedy, have in effect reduced the procedure from the elevation of prerogative to that of ordinary right as between subject and subject, and that the only difference is a mere matter of form; the procedure even in respect of petitions of right being substantially identical with that of an ordinary action at law. And it is to be observed that the Act in question is throughout mandatory and not in any way merely provisional or conditional. Nor can the Sovereign's *fiat* that "right be done" be refused, the endorsement to that effect being a mere matter of form. Of course the petition, or suit as it may be called, being thus admitted to a hearing, has to run the gauntlet of the ordinary course of pleading before issue is joined, and a *demurrer* if allowed might, as in other cases, extinguish the claim. Very little therefore is taken by a reference to the procedure under such petition, the rights of the Crown being in fact given up, and resort to the ordinary tribunals being expressly allowed, not merely by the grace of the Crown, but by the express law provided by an Act of the Legislature.

I have thought it right to offer these observations on the Government's alleged immunity from litigation of this kind, but it is unnecessary for me to say more on the subject, as I have formed the clear opinion that the plaintiff's case fails by reason of his non-compliance with the conditions imposed upon him by his contract or treaty, or whatever it may be called, with the Government. The appeal is dismissed with costs.

Appeal dismissed.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. INDARMAN.

Obscene Book—Act XLV of 1860 (Penal Code), s. 293—Destruction of book by order of Criminal Court—Act X of 1872 (Criminal Procedure Code), s. 418.

A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage.

The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious

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controversy. *Held* that the excessive obscenity of such books took away the protection which their controversial nature might otherwise have afforded them. Also that the intention of the seller and distributor must be gathered from the character of the matter contained in such books. As he had chosen to sell and distribute what was obscene, it must be presumed that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It was not sufficient for him to say that his intentions were good. It was his public act that must be the test of his intentions, and having done an unlawful act, it was no answer to say that he thought it lawful.—*Queen v. Hicklin* (1) and *Steele v. Brannan* (2) followed.

At the conclusion of the trial of a person for the sale and distribution of obscene books, the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under s. 418 of the Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order.

THIS was an application to the High Court for revision of an order of Mr. H. D'O. Moule, Magistrate of the Moradabad District, dated the 24th July, 1880, convicting the petitioner of the sale and distribution of obscene books, an offence punishable under s. 293 of the Indian Penal Code. The petitioner was the author or compiler of two works called respectively "*Hamla-i-Hind*" and "*Sam-sam-i-Hind*." These works were controversial works in favour of Hinduism and in disparagement of the Muhammadan religion. They were printed by the petitioner and copies of them were kept by him at his residence for sale and distribution. When the Magistrate became aware of the existence of the books, he requested Mir Imdad Ali Khan, C.S.I., a Muhammadan, one of his Subordinate Magistrates, to examine the books and report on them. The Subordinate Magistrate did so, and upon reading the report and the passages extracted, the Magistrate of the District instituted criminal proceedings against the petitioner. The Magistrate at the trial of the petitioner selected two passages from the "*Sam-sam-i-Hind*" and one from the "*Hamla-i-Hind*," which were, in his opinion, obscene; and convicted the petitioner under s. 293 of the Penal Code with reference to these passages, sentencing him to pay a fine of Rs 500. He also directed, with reference to s. 418 of Act X of 1872, that the copies of the books voluntarily surrendered by the petitioner should be destroyed. On appeal by the petitioner the Sessions Judge of Moradabad, by an order dated the

(1) L. R., 3 Q. B. 360.

(2) L. R., 7 C. P. 261.

22nd September, 1880, affirmed the conviction, but reduced the sentence to a fine of Rs. 100.

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The grounds upon which the petitioner applied for revision of the case are set out in the judgment of the High Court.

Messrs. *Ross* and *Hill*, for the petitioner.

Mr. *Colvin* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STRAIGHT, J.—This is an application for revision, under s. 297 of the Criminal Procedure Code, of a decision passed by the Judge of Moradabad, on the 22nd September last, dismissing an appeal from an order of the Magistrate of the same place, by which the applicant was convicted under s. 293 of the Penal Code, and sentenced to pay a fine of Rs. 500. The grounds taken in the petition are somewhat prolix, but the points urged by the learned counsel were shortly as follows:—(i) That the charge was insufficiently stated, in that it did not set out the several passages alleged to be obscene; (ii) that the Magistrate should have summoned the witnesses named by the defendant; (iii) that, in his judgment, the Judge has relied upon portions of the books to which no reference was made at the time of the hearing of the appeal; (iv) that the three passages excerpted by the Magistrate do not make the books obscene books within the meaning of the Penal Code; (v) that the books are not obscene, and that the circumstances of publication were not considered either by the Magistrate or the Judge; (vi) that the *mens rea* of the defendant was not established; (vii) that the order for the destruction of the books under s. 418 of the Criminal Procedure Code was *ultra vires*; (viii) that having regard to the loss inflicted upon the defendant by the destruction of his books, the fine inflicted on him should be wholly remitted. (After disposing of the first three grounds, the learned Judge continued:) I cannot accede to the principle enunciated in the fourth ground taken on behalf of the applicant, nor am I prepared to hold that a book cannot be an obscene book within the meaning of the Penal Code, if it only contains a single obscene passage. To broadly accept such a doctrine would to my mind be mischievous in the

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extreme, for if the argument is of any value, the logical conclusion to which it must be carried is, that the most filthy and obscene matter might be published in, and made part of, a book, if it was only confined within a limited area. I entirely dissent from any such view, and did the exigencies of the case require it, I should most unhesitatingly hold that the matter appearing at page 94 of the *Hamla-i-Hind* was abundantly sufficient to constitute that work an obscene book and a fit subject for prosecution.

The substantial case for the applicant, however, is contained in the fifth and sixth of the grounds set out above, and to put it shortly it is this, that the *Sam-sam-i-Hind* and *Hamla-i-Hind* are not obscene books, and that they were published *bonâ fide* and with a good intention in prosecution of a controversy between the Hindus and Musalmans of Moradabad, respecting the relative merits of the Hindu and Muhammadan religions. This contention involves two considerations : first, are the books obscene in fact? second, if they are, were the circumstances of publication such as to justify it in point of law. As to the former of these points, both the Magistrate and the Sessions Judge have decided that the books are obscene, and with their findings in this respect it is not competent for me to interfere in revision, though I may add I entirely approve of the conclusions at which they arrived upon this point. For my own satisfaction, and to enable me to deal properly with the case as a whole, I thought it right to have a considerable portion of both pamphlets translated. and I have no hesitation whatever in saying that each of them contains a large amount of obscene matter. The whole case for the applicant is therefore narrowed down to this single question, were the two books published by him under such circumstances that their publication was legally justifiable? Now it is said that there was a controversy between the Hindus and Musalmans of Moradabad concerning their several religions, and that books of a like kind to the *Sam-sam-i-Hind* and the *Hamla-i-Hind* had been printed and promulgated by the Musalmans in that city and elsewhere. I will assume this to be correct, and that those works contained the most offensive and obscene allusions to the deities of the Hindus, and to subjects and things held in veneration by them, and that they were in the fullest sense of the term objec-

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tionable and insulting. But it is in so strongly urging this circumstance as the basis of his defence that the fallacy and weakness of the applicant's answer to the charge made against him are manifested. Because the Muhammadans, pleads he, have published filthy and revolting matter about my deities and my religion, therefore I was justified in retaliating in a similar fashion. This is a somewhat novel mode of conducting a controversy. This is no agitation of contrary opinions according to the well understood and generally accepted meaning of the word controversy, but a mere retorting of foul and indecent abuse for foul and indecent abuse, which it would be intolerable should be permitted in any civilized society. It is worse than no argument to say that because somebody else has committed an offence against you, you should have free leave and license to commit a similar offence against that somebody. Assuming that the Muhammadans were guilty of all that the applicant and his party allege against them, and that they ought to have been punished, this is no justification for the dissemination of matter such as that to be found in the two books the subject of the present prosecution. For any man to suppose that the cause of his religion could be benefited by the publication of works of such a character, would indicate a depravity of moral sense and mental incapacity with which I should be slow to credit a person of the apparent intelligence of the applicant or indeed any other educated native. If the Musalmans had published and promulgated disgusting anecdotes and stories concerning Vishnu, Brahma, and Mahadeo, in what way could it help the cause of the Hindu faith in the controversy with its assailants to publish, for example, matter like that to be found at pages 51 and 52 of the *Sam-sam-i-Hind*, and pages 62 and 94 of the *Hamla-i-Hind*? I care not whether these passages are quoted from other books or whether they originated in the brain of the applicant, they are revolting and obscene, and it is really shocking to think that any person possessed of common decency could have brought himself to publish them. No one would wish to interfere with the publication of such things as are necessary for the legitimate purposes of controversy, or for the discussion of any religious or social questions in the fullest and freest manner, but there are limits of decency which must not be transgressed, and it is by their very ex-

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cess of all bounds of propriety that the protection, which the appellant's books might otherwise have had accorded them, is taken away. Literature of such a kind could not but be calculated to have the most pernicious influence upon the minds of many of those into whose hands it would come, by directly appealing to their impure instincts and thoughts, and it is simply idle to contend that good morals would not be prejudiced by it. But it was also urged by the applicant's counsel that the moral standard and condition of those who were likely to buy such books was an important element for consideration in the case, and that both the Magistrate and Judge should have taken evidence upon this point. I am not quite sure whether I rightly understand the argument. If it means that the Hindus and Musalmans of Moradabad are mentally and morally of so low a type that what would appear obscene to an ordinary nature would not so present itself to their eyes, I cannot for a moment seriously entertain the contention. I can conceive no grounds of propriety or justice upon which any such consideration should be taken into account, in determining either the character of the incriminated books or the guilt of their author. The question of obscenity or no obscenity cannot be subjected to any such fluctuating test, but must be answered in a broad and intelligible manner, such as will be comprehensible and commend itself to the majority of ordinary and decent minded persons. If, however, the argument of the applicant's counsel means that the controversialists who were likely to purchase the *Sam-sam-i-Hind* and the *Hamla-i-Hind* would be so inflamed with the spirit of controversy that the books would not seem obscene to them, nor could they be injuriously affected, his proposition seems to me even more untenable. In dealing with a question of this grave public importance, it will not do to speculate as to who is or is not likely to buy the work. In this case, it is proved beyond dispute that the books were sold at a price within anybody's reach; that they were readily obtainable; and that no limitation or reservation was made as to the age or class of persons by whom they could be purchased. In short, it is clear that they were open to the public and that any member of the community upon payment of his eight annas could get a copy. The notion, therefore, that their circulation was restricted to the controversialists of Moradabad, a

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very hazy and indefinite body of persons by the way, is directly negatived. But even had it been otherwise, I should have felt myself bound to hold that neither the necessities of controversy nor a defence of the Hindu religion from the attacks of the Muhammadans justified the excess of obscenity to be found in the pages of these two books. As I have already remarked, it is indifferent whether the applicant himself originated the indecent matter, or took it literally or in a garbled form from the works of other authors. There it is in his books, and he is equally responsible for it in the one case as in the other. The observation that many works of a similar description have escaped prosecution is wholly beside the question. There are many books in many languages which, if brought to the test of public trial, could not but be pronounced obscene. But the immunity they have so far enjoyed is not because the law was not strong enough to reach them, but because its aid has not been invoked, or the authorities have thought it wiser not to put it into force. With regard to the question of the intention of the applicant in publishing the two books, it is scarcely necessary to say more than this, that it must be gathered from the character of the matter to be found in them. If he has chosen to print what a competent tribunal has declared to be obscene, there is no alternative open but to presume that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It is not sufficient for the applicant to say, my private motives and objects were dictated by a laudable and honest desire to expose the errors and fallacies of the Muhammadan creed, to prevent its obtaining converts, and to vindicate my own religion from the attacks of those who had assailed it. It is his public conduct that must be the test of his intention, and having done an unlawful act, it is no answer to say that he thought it was lawful. This principle is clearly laid down in the case of *Queen v. Hicklin* (1), a well known and generally accepted authority which was adopted by the Court of Common Pleas in *Steele v. Brannan* (2). Such being the views I entertain, I am clearly of opinion that, so far as the application invites a revision of the conviction of the applicant, it cannot be entertained and must be rejected. I think the Magistrate's decision that an offence had been committed under s. 293 of the Penal Code was a

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most proper one, and that the Sessions Judge rightly declined to disturb it in appeal.

With regard to the seventh ground urged in the petition, it appears to me that it has force. I do not think the Magistrate was empowered by s. 418 of the Criminal Procedure Code to direct the destruction of the books surrendered by the applicant. I am far from saying that it would not have been a most proper order for him to make, if express sanction had been given him by law to do so, but in my judgment it would be placing a very strained construction upon the words of s. 418 to hold them as giving him any such authority. I am glad to observe that in cl. 532 of the proposed new Code of Criminal Procedure a specific provision on the subject finds a place, though I may perhaps add, having regard to the fact in the present case that the applicant voluntarily handed over all the copies of his two books to the Magistrate, that it would be more convenient if no such limitation were made as might be inferred from the words—"which remain in the possession or power of the person convicted." I have only further to remark, with respect to the seventh ground urged for revision, that the books having been destroyed, it is obvious I can pass no order about them, which could have any practical effect. (The learned Judge then proceeded to dispose of the eight ground.)

Application rejected.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Duthoit.

AHMAD ATA (PLAINTIFF) v. MATA BADAL LAL (DEFENDANT).*

Death of plaintiff-appellant—Order directing suit to abate—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 366, 588 (18).

An appellate Court rejected the application of the legal representative of a deceased sole plaintiff-appellant to enter his name in the place of such appellant on the record, on the ground that such application had not been made within the time limited by law, and passed an order that the suit should abate. *Held* that the order of the appellate Court, passed under the first paragraph of s. 366 of Act

*Second Appeal, No. 11 of 1881, from a decree of M. S. Howell, Esq., Judge of Jaunpur, dated the 29th September, 1880, affirming a decree of Pandit Soti Behari Lal, Munsif of Jaunpur, dated the 15th December, 1879.

X of 1877, not being appealable under cl. (18), s. 588 of that Act, nor being a decree within the terms of s. 2 from which a second appeal would lie, was not appealable.

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THIS suit was instituted by one Jokhan Bibi. The Court of first instance dismissed the suit, and on the 20th January, 1880, Jokhan Bibi preferred an appeal from its decree. On the 4th June, 1880, while this appeal was pending, Jokhan Bibi died. On the 28th September, 1880, while the appeal was still pending, Ahmad Ata, the husband and legal representative of Jokhan Bibi, applied to the lower appellate Court to have his name entered on the record in her place. The lower appellate Court rejected this application, on the ground that it had not been made within the time allowed by law, and that, assuming that it might be admitted after time when the applicant showed that he had sufficient cause for not presenting it within time, the applicant had not shown sufficient cause for not presenting it within time; and made an order under s. 366 of Act X of 1877 "that the suit should abate."

Ahmad Ata appealed to the High Court, contending that the lower appellate Court was not competent to "strike off the appeal;" and that he had sufficient cause for not making his application within time.

Munshis *Hamuman Prasad* and *Sukh Ram*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgment :—

STRAIGHT, J.—A preliminary objection is taken by the pleader for the respondent to this appeal being entertained. He argues that the order of the lower appellate Court, passed under the first paragraph of s. 366 of the Civil Procedure Code, is not appealable under cl. (18), s. 588 of the same Act, nor is it a decree within the terms of s. 2 from which a second appeal would lie. We are of opinion that this contention has force, and that it is fatal to the appeal, which must be dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Straight and Mr. Justice Duthoit.

**BHAWANI PRASAD SINGH (DEFENDANT) v. BISHEBHAR PRASAD MISE
AND OTHERS (PLAINTIFFS).***

Suit to cancel instrument—Suit for the rescission of a contract—Time from which limitation runs—Act XV of 1877 (Limitation Act), sch. ii, Nos. 91, 114—Equitable estoppel.

B, P, and G sued to cancel a lease of certain land on the ground that the lessor was not competent to grant the same, the defendants being the lessor and the lessee. The lessee's defence to the suit was that the lease had been executed with *B's* knowledge, who caused it to be attested and registered; that it was recognized and adopted by *P* and *G*, who allowed the lessee to take possession of such land and had accepted rent from him in respect thereof; that under these circumstances the plaintiffs were estopped from denying the lessor's competency to grant the lease; and that the suit was barred by limitation, as more than three years had elapsed from the date of the lease. The lower appellate Court affirmed the decree of the Court of first instance in the favour of the plaintiffs on the ground that the lessee was aware that the lessor was not competent to grant the lease. *Held*, on second appeal by the lessee, that the limitation applicable to the suit was to be found in No. 91, sch. ii of Act XV of 1877, and not No. 114, that last article referring to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside; and that, as regards *B*, inasmuch as the existence of the lease became known to him at the time of its execution, and three years from that time had expired, the suit was barred by limitation.

The proper issues as between *P* and *G* and the lessee framed and remitted for trial.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case under s. 566 of Act X of 1877.

Babu Baroda Prasad Ghose, for the appellant.

The Senior Government Pleader (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the respondents.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) made the following order of remand :—

STRAIGHT, J.—This is a suit for possession of 4 bighas 19 biswas of land situate in mauza Singhur, patti Awal, by cancelment of an *istimrari patta* of the 8th June, 1876, granted by one Lachmi Kuar, defendant in the present suit, to Bhawani Prasad Singh, defendant-appellant, and for mesne profits of 1284, 1285, and 1286 fasli. The

* Second Appeal, No. 10 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 29th September, 1880, modifying a decree of Babu Mirtonjoy Mukarji, Munsif of Benares, dated the 17th June, 1880.

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plaintiffs-respondents Bisheshar Prasad and Bhagwan Prasad are the sons of one Sheo Bakhsh Rai, and they had two brothers, Durga Prasad and Gaya Prasad. Durga Prasad had two sons, Bhairon Prasad and Raghubir Prasad, who died leaving their widows Lachmi Kuar defendant, and Bakht Kuar now deceased, them surviving. Gopal Chand, plaintiff-respondent, purchased the share of Gaya Prasad, and, having brought a suit for possession of it against Lachmi Kuar, Bisheshar Prasad and Bhagwan Prasad, obtained a decree on the 19th August, 1876. While this suit was in progress, namely, on the 8th June, 1876, Lachmi Kuar granted the perpetual lease now in question to Bhawani Prasad, appellant. The substantial defence put forward is that the *patta* was executed by Lachmi Kuar with the knowledge of Bisheshar Prasad, who caused it to be attested and registered; that it was recognised and adopted by Bhawani Prasad Singh and Gokal Chand, who allowed the defendant to take possession of the land, and who had received rent from him in respect of it; and that the proceedings not having been instituted within three years from the date of the lease, the claim was barred by limitation. The Munsif decreed in favour of the plaintiffs, except as to the mesne profits for 1284 and 1285 fasli, which he refused, allowing for 1286 only. The defendant Bhawani Prasad Singh appealed to the Judge, the plaintiffs lodging objections under s. 561 of the Civil Procedure Code, with reference to the mesne profits for 1286 fasli. From the judgment of the lower appellate Court it appears that the pleas of the appellant of limitation, to the jurisdiction of the Civil Court to try the suit, and for the allowance of mesne profits for 1286 were abandoned, and that the sole point relied on by him was that, as Bisheshar Prasad and Bhagwan Prasad (Gokal Chand not being mentioned), plaintiffs, recognised the proprietary title of Lachmi Kuar by allowing her to execute the lease and subsequently adopting the appellant as lessee, they were now estopped from denying her title to grant it. The Judge remarks: "Palpably Lachmi Kuar had no right to grant a perpetual lease to Bhawani Prasad, and the latter person undoubtedly was not misled, but was well aware of the real state of things, for he himself had been the *karinda* or agent of Lachmi Kuar, and his son Ujagar Singh held the same post at the time the *istimrari patta* was executed." Upon this view he dismissed the appeal, at

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the same time allowing the objections of the plaintiffs to the extent of the two-third mesne profits claimed by Bisheshar Prasad and Bhagwan Prasad. Bhawani Prasad Singh, defendant, now appeals to this Court, and pleads, first, that the suit is barred by limitation; secondly, that Gokal Chand being a stranger has no right to sue; thirdly, that Bisheshar Prasad, having acted as agent for Lachmi in and about the execution of the lease, is estopped from now denying her title to grant it. Gokal Chand, plaintiff, also filed objections under s. 561 of the Civil Procedure Code to the disallowance of his proportion of the mesne profits for 1284 and 1285 fasli.

With regard to the plea of limitation, although it seems to have been abandoned in the lower appellate Court, we must of necessity notice it, now that it is pressed here. Looking at the frame of the suit, its primary object is undoubtedly to obtain the cancelment of the *istimrari patta*, and we therefore think that the limitation applicable is to be found in art. 91, sch. ii of Act XV of 1877, namely, three years. The appellant's pleader suggested art. 114, but that obviously refers to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside. This, however, does not materially affect the case, as limitation under either article has to be calculated upon the same principle. The test in the present case is, when did the facts entitling the plaintiffs to have the lease cancelled first become known to them? With regard to Bisheshar Prasad, it is admitted that he knew of the execution of the *patta*, for he got it attested and registered, and he was therefore as well aware in June, 1876, as he is now, of all the facts invalidating that instrument, upon the strength of which he bases the present suit. Under these circumstances we are of opinion that, so far as Bisheshar Prasad is concerned, the plea of limitation should prevail, and to this extent the appeal must be decreed with costs, and the relief asked by Bisheshar Prasad refused. With regard to the plaintiffs Bhagwan Prasad and Gokal Chand, the question of limitation presents different considerations. Their allegation was that the existence of the lease first came to their knowledge in November, 1878, and if this be correct, their suit is in time. But the judgments of both the lower Court are silent upon this point, and before we can finally dispose of this appeal, so far as it affects them, we must

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obtain a clear finding as to the date on which they learnt for the first time that Lachmi Kuar had executed the *istimrari patta*. The plea as to the plaintiff Gokal Chand's capacity to sue has no force. He was the transferee of the rights of Gaya Prasad, and stands in his shoes, and is therefore clearly entitled to prefer the present claim. The question of estoppel has been dealt with by the Judge in the passage already referred to in this judgment, and it is unnecessary to discuss it so far as it affects Bisheshar Prasad, because we have excluded him from relief on the ground that the suit is barred by limitation. Had it been otherwise, the further question would have arisen whether he, being *in pari delicto* with Bhawani Prasad, who was in possession, in the matter of the execution of the lease, could properly maintain a suit to set it aside. This point may hereafter present itself, with reference to Bhagwan Prasad and Gokal Chand, though the determination of it will greatly depend upon the finding returned to us by the lower appellate Court upon the issues now remitted. Our present order must therefore be that the appeal, in so far as it relates to Bisheshar Prasad, will be decreed with costs in proportion. With regard to Bhagwan Prasad and Gokal Chand, we remand the case under s. 566 of the Civil Procedure Code for determination of the following issues: (i) When did Bhagwan Prasad and Gokal Chand first become aware of the existence of the *istimrari patta* of the 8th June, 1876? (ii) Have they, by any declaration, act or omission, intentionally caused or permitted Bhawani Prasad Singh, defendant, to believe that Lachmi Kuar had a proprietary title in the 4 bighas 19 biswas granted by the lease, and if so, what was the nature of such declaration, act or omission? (iii) Assuming that Bhawani Prasad Singh, defendant, knew that Lachmi Kuar had no proprietary right in the land, did Bhagwan Prasad and Gokal Chand lead him to believe that they acquiesced in, and consented to, her granting the lease. The findings when recorded will be returned to this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar. The objections of Gokal Chand under s. 561 will be dealt with hereafter, when the final order is passed disposing of the appeal.

Cause remanded.

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June 14.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

DABI DIN RAI (PLAINTIFF) v. MUHAMMAD ALI AND OTHERS (DEFENDANTS).*

*Pre-emption—Conditional decree—Act X of 1877 (Civil Procedure Code), s. 214—
Computation of period specified for payment of purchase-money—Holiday.*

The decree in a suit to enforce a right of pre-emption, dated the 12th December, 1879, declared that the plaintiff should obtain possession of the property on payment of the purchase-money "within thirty days," but that if such money was not so paid, the suit should stand dismissed. The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed, expired on the 11th January following. That day was a Sunday: the plaintiff paid the purchase-money into court on the next day, the 12th January. *Held* that, inasmuch as the day on which the decree was made should not be taken into account in computing the period specified in the decree for the payment of the purchase-money, nor the last day of that period, that day being a Sunday, the plaintiff had complied with the condition imposed on him by the decree.

Seemle that, if the plaintiff had actually failed to deposit the purchase-money within thirty days as directed by the decree, his suit would have been liable to be dismissed, as he could not have claimed to have such period computed from the date the decree became final.

THE plaintiff in this suit claimed to enforce a right of pre-emption. The Court of first instance gave him a decree, bearing date the 12th December, 1879. This decree directed that the plaintiff should obtain possession of the property in suit on payment of the purchase-money "within thirty days," and that, if the purchase-money were not paid within that period, "the decree should be extinguished." The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed, expired on the 11th January, 1880. That day was a Sunday: the plaintiff paid the purchase-money into court on the next day, the 12th January. On appeal by the defendants from the decree of the Court of first instance it was contended on their behalf that that decree should be set aside, as the plaintiff had not deposited the purchase-money within the period specified in the decree. The lower appellate Court allowed this contention.

* Second Appeal, No. 912 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 1st May, 1880, reversing a decree of Mirza Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 12th December, 1879.

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On second appeal to the High Court the plaintiff contended (i) that the period for the payment of the purchase-money into court specified in the decree of the Court of first instance should be computed from the day on which that decree became final; and (ii) that, as such period only began to run on the 13th December, and as the 11th January, being a holiday, should not be computed, the purchase-money had been deposited within time.

Mr. Niblett and Lala Jokhu Lal, for the appellant.

The Senior Government Pleader (Lala Juala Prasad) and Munshis Hanuman Prasad and Kashi Prasad, for the respondents.

The High Court (STUART, C. J., and STRAIGHT, J.,) delivered the following judgments :—

STRAIGHT, J.—It seems to me that this appeal must prevail, and that the case should be remanded back to the Judge for decision on the merits, he having disposed of it on a preliminary point. It does not appear to me to be necessary to discuss the first plea urged by the appellant. The Munsif was acting within the powers given him by s. 214 of the Procedure Code, and I am by no means prepared to hold that, had the pre-emptor actually failed to pay the purchase-money, directed to be deposited by the decretal order, within thirty days, his suit would not have been liable to be dismissed. But as a matter of fact, I cannot see that there has been any breach of the condition imposed by the Munsif as to payment into court of the pre-emption amount. His judgment was passed upon the 12th December, 1879, and it certainly would be straining matters to hold that any portion of that day was to be taken into account, in computing the period allowed to the pre-emptor to satisfy the vendees and secure full effect to his decree. Thirty clear days, which it must have been intended he should have, would have given him until the 11th January following, but this happened to be a Sunday, and the amount was duly deposited on Monday, the 12th. It seems to me, therefore, only reasonable to regard this as a compliance with the condition imposed by the Munsif, and in adopting a contrary view, the Judge acted erroneously. I would accordingly decree the appeal, reverse the decision of the

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lower appellate Court, and remand the case for replacement on the file and disposal upon the merits. Costs will follow the result.

STUART, C. J.—I approve of, and concur in, the order of remand proposed by Mr. Justice Straight.

Cause remanded.

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June 14.

Before Mr. Justice Straight and Mr. Justice Duthoit,

MAUJI RAM (PLAINTIFF) v. TARA SINGH (DEFENDANT).*

Guardian and Minor—Mortgage without the sanction of the Civil Court—Act XL of 1858, s. 18—Void Contract—Ratification by minor.

A minor cannot ratify a mortgage of his immoveable property made by his guardian appointed under Act XL of 1858, without the sanction of the Civil Court, such a mortgage being under s. 18 of that Act void *ab initio*.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court,

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgment:—

STRAIGHT, J.—On the 29th August, 1872, Prem Sukh, the certificated guardian of the defendant, Tara Singh, then a minor, hypothecated certain immoveable property belonging to his ward to Jiwan and Chattar, for an advance of Rs. 95, which was to be repaid on or before the 1st February, 1880. It is admitted that Prem Sukh did this without the sanction of the Civil Court first obtained, as required by s. 18 of Act XL of 1858. It is obvious, therefore, that this contract was void. On the 11th September, 1878, Tara Singh himself executed a bond for Rs. 47, hypothecating property for its repayment, but this instrument was not registered. Its bearing upon the present case is that it contains the following passage: “ Besides this bond there is one bond (registered) for

* Second Appeal, No. 67 of 1881, from a decree of Maulvi Sultan Hassan, Subordinate Judge of Agra, dated the 27th September, 1880, reversing a decree of Maulvi Muharak-ul-lah, Munsif of Jalesar, dated the 11th June, 1880.

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Ra. 95 dated Bhadon Badi 11th, Sambat 1929, and another (unregistered) for Rs. 50, dated Asadh Sudi 9th, Sambat 1930, both executed by my guardjan Prem Sukh : there is no other beside these : any excuse or objection made by me shall be considered false." The bonds of the 29th August, 1872, and Asadh Sudi 9th, Sambat 1930, were sold by Jiwan and Chattar to the plaintiff-appellant on the 14th January, 1880. The present suit was instituted on the 13th February, 1880, and it is based upon the bond of the 29th August, 1872, to recover Rs. 95 principal and Rs. 170 interest, by enforcement of hypothecation against the property pledged therein. The Munsif decreed the claim, holding that the words in the bond of the 11th September, 1878, already set forth, amounted to an admission by Tara Singh after he came of age, and that the consideration of the bond executed by his guardian had been received and was due from him. The Subordinate Judge reversed this decision, and the plaintiff appeals to this Court. It is plain that this suit, which is brought on the bond of the 29th August, 1872, must fail. That instrument was *ab initio* void, by reason of its having been executed by Prem Sukh directly in contravention of the provision of law contained in s. 18 of Act XL of 1858, and the hypothecation contained in it was worthless. It was therefore out of the power of the defendant, on coming of age, to make this void contract a valid and binding one, though it was of course competent for him to enter into a fresh agreement to pay the debt on his own account. This he would seem to have done by the terms of the bond of the 11th September, 1878. Whether the words of that instrument are sufficient to create a hypothecation is a point that need not be considered, first, because the plaintiff's present claim is not based upon it, and next, if it were, its non-registration would be an insurmountable obstacle to his obtaining a decree for enforcement of lien. It may be that the plaintiff could have brought a suit for the simple debt, treating the words in the bond of the 11th September, 1878, as a binding acknowledgment and promise to pay. But this is not the shape in which he has presented his claim, and as brought it has been properly rejected. The appeal must therefore be dismissed with costs.

Appeal dismissed

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Before Mr. Justice Straight and Mr. Justice Duthoit.

RAJINDRA KISHORE SINGH (DEFENDANT) v. RADHA PRASAD SINGH (PLAINTIFF).*

Amendment of plaint—Appeal—Act X of 1877 (Civil Procedure Code), ss. 53, 588 (6)

The plaintiff in a suit applied for the amendment of the plaint. The defendant objected to the amendment, and a day was fixed by the Court for the "admission or rejection of the petition of amendment and the determination of the defendant's objections thereto." The Court, after hearing the parties, made an order allowing the "petition of amendment" and rejecting the defendant's objections. The defendant appealed from such order to the High Court. *Held* that, inasmuch as orders amending plaints then and there are not made appealable by Act X of 1877, and it was into this category, if into any at all, that such order must fall, such order was not appealable.

THE plaintiff in this suit originally claimed 2,537 bighas 6 biswas of land situated in a village called Chandpur Dyara, of which he specified the boundaries. After the first hearing of the suit it appeared that 3,461 bighas 19 biswas of land were comprised within such boundaries. The plaintiff thereupon preferred a petition to the Court of first instance, praying that the extra 924 bighas 13 biswas of land might be considered to be included in his claim, and the plaint be amended accordingly. The defendant objected to the amendment of the plaint as prayed by the defendant; and a day was fixed by the Court for the "admission or rejection of the petition of amendment, and the determination of the defendant's objections thereto." After hearing the parties, the Court decided that the "petition of amendment" should be allowed, rejecting the defendant's objections.

The defendant appealed to the High Court against the order of the Court of first instance, contending that the plaint had been improperly amended, inasmuch as a plaint could not properly be amended after the first hearing of the suit, and as the amendment was not one which could be made under s. 53 of Act X of 1877, and as the plaintiff's cause of action in respect of the extra land he claimed did not arise until after the institution of the suit.

Mr. Colvin, the Junior Government Pleader (Babu Dwarka Nath Bannarji), and Munshi Sukh Ram, for the appellant.

* First Appeal, No. 45 of 1880, from an order of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 26th February, 1880.

Mr. Conlan and Lala Lalta Prasad, for the respondent.

The judgment of the High Court (STRAIGHT, J., and DUTHOIT, J.) was delivered by

STRAIGHT, J.—A preliminary objection to the hearing of this appeal is taken by Mr. Conlan, counsel for the plaintiff-respondent, that the plaint, not having been “returned for amendment,” within the meaning of s. 53 of the Civil Procedure Code, but being amended by the Subordinate Judge himself, after hearing the parties, his order is not appealable under cl. 6, s. 588 of the Code. This contention is a sound one and must prevail. Under s. 588 of Act X of 1877, as it originally stood, orders “rejecting plaints” or “returning plaints as not disclosing any cause of action” could be made the subject of appeal. But by amendments introduced in Act XII of 1879, orders “rejecting plaints” are now to be treated as “decrees,” while all orders “returning plaints” without any limitation as to the clause of s. 53 under which they have been passed are made appealable. Orders amending plaints then and there are as heretofore left without any provision as to appeal, and it is into this category, if into any at all, that the order passed by the Subordinate Judge must fall. It is admitted by the pleader for the appellant that the plaint was not returned to his client, but that it remained upon the file. It is obvious, therefore, that cl. 6, s. 588, is not applicable to the order of the Subordinate Judge, who did not direct the plaint to be returned for amendment, and this appeal therefore does not lie. It is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KISHNA RAM (DEFENDANT) v. NARSINGH SEVAK SINGH AND OTHERS
(PLAINTIFFS).*

*Return of plaint to be presented to proper Court—Remand by appellate Court—
Second appeal—Act X of 1877 (Civil Procedure Code), ss. 57 (a), 582, 588.*

The Court of first instance made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit. On appeal from such order the appellate Court, holding that the Court of first instance was competent to try such suit, made an order “decreeing the appeal.” It subsequently made an additional order directing that the case “should be returned

* First Appeal, No. 37 of 1881, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 7th February, 1881.

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for re-trial." On appeal to the High Court from such additional order, add that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which under the last clause of s. 588 of Act X of 1877 was final, and not an appeal from an order remanding a case under s. 562, the character of the original order of the appellate Court not being altered by the passing of the additional order.

IN this case the Court of first instance (Munsif) made an order returning the plaint to be presented to the proper Court, on the ground that its jurisdiction did not extend to the value of the subject-matter in dispute. The plaintiffs appealed from this order to the District Court, which, by an order dated the 6th November, 1880, "decreed the appeal," holding that the Munsif was competent to try the suit. By a subsequent order, dated the 7th February, 1881, which the District Court observed it had accidentally omitted to make, the District Court directed that the "case would be returned for re-trial." The defendant appealed to the High Court from the District Court's order dated the 7th February, 1881, contending that the suit was not cognizable in the Munsif's Court.

Munshi *Sukh Ram*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

The judgment of the Court (STRAIGHT, J., and TREBELL, J.) was delivered by

STRAIGHT, J.—A preliminary objection is taken by the pleader for the respondents that this appeal cannot be entertained, it being in reality from an order of the Judge passed in appeal under s. 588 of the Civil Procedure Code from an order of the Munsif under cl. (a), s. 57 of the same Code. By the last paragraph of s. 588, orders passed in appeal under that section are declared to be final. The contention is a valid one and must prevail. The addendum of the Judge to his original order, "that the case will be returned for re-trial," does not alter the character of that order, so as to bring it within s. 562 of the Code. The present appeal is therefore not properly from an order remanding a case that has been dismissed by the first Court on a preliminary point for re-trial, but from an order passed in appeal from an order returning a plaint, which is not appealable. The appeal must therefore be dismissed which costs.

Appeal dismissed.

*Before Mr. Justice Tyrrell and Mr. Justice Duthoit.*1881
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PIARI (DEFENDANT) v. KHALI RAM (PLAINTIFF.)*

Omission to sue for one of several remedies—Act X of 1877 (Civil Procedure Code), s. 43—Mortgage.

A mortgagee had two remedies in respect of the mortgagor's breach to pay the stipulated interest at the time fixed by the contract of mortgage, one being a suit on foreclosure proceedings to convert the mortgage into a sale, and the other a suit to recover his money against his debtor by enforcement of his lien against the mortgaged property. He sued for the first remedy in respect of such breach, omitting the second. His suit was dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage-term. He afterwards sued for the second remedy. *Held* that, inasmuch as the mortgagee was not at the time of his suing for the first remedy "a person entitled to more than one remedy," not being "entitled" to the first but only to the second, his omission at that time to sue for the second remedy was not under s. 43 of Act X of 1877 a bar to his afterwards suing for it.

THE defendant in this suit gave the plaintiff a mortgage for Rs. 500 on certain immovable property. The instrument of mortgage contained the following, amongst other, stipulations: "I (mortgagor) shall pay the said amount with interest at two per cent. per mensem within two years: I shall pay the interest every month, and in the event of default the mortgagee shall be at liberty to realize the whole sum due to him, with the interest for two years, without waiting for the expiry of the term, by instituting a suit or by making an application for foreclosure as absolute owner: these two courses are open to the mortgagee; it is optional with him to pursue whichever he pleases." A default in the payment of interest having occurred, the plaintiff, mortgagee, applied under Regulation XVII of 1806 for foreclosure, and after the usual proceedings under that Regulation had been taken the mortgage was foreclosed. The plaintiff then sued the defendant for possession of the mortgaged property. This suit was dismissed, it being held that it had been brought "prematurely," that is to say, before the expiry of the term of two years stipulated for the payment of the principal amount in the instrument of mortgage. The plaintiff thereupon instituted the present suit, in which he claimed to recover the principal amount of the mortgage, Rs. 500, and interest thereon, from the defendant

* Second Appeal, No. 1335 of 1880, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 21st September, 1880, affirming a decree of Munshi Lalit Prasad, Munsif of Cawnpore, dated the 30th June, 1880

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personally, and by the sale of the mortgaged property. The defendant set up as a defence to the suit, *inter alia*, that it was barred by the provisions of s. 43 of Act X of 1877, inasmuch as the plaintiff was claiming a remedy which he might have claimed in the former suit, but omitted so to do. Both the lower Court disallowed this contention. On second appeal to the High Courts the defendant again contended that the suit was barred by the provisions of s. 43 of Act X of 1877.

The Senior Government Pleader (Lala Juala Prasad) and Shah Asad Ali, for the appellant.

Mr. Siraj-ud-din and Pandit Ajudhia Nath, for the respondent.

The judgment of the High Court (TYRRELL, J., and DUTHOIT, J., so far as it is material to the purposes of this report, was as follows:—

TYRRELL, J.—There is ingenuity in the other plea that the suit is barred by the last, that is, the new, provision of s. 43 of the Civil Procedure Code: “A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.” It is plain that the plaintiff-respondent had under his bond secured to him two remedies in respect of his loan, a suit (a) on foreclosure proceedings to convert the mortgage transaction into an absolute sale to him of the mortgaged property, and a suit (b) to recover his money against his debtor by enforcement of his lien against the masonry house and against her other estate generally. He chose to adopt the first remedy, omitting the second, when he brought his suit for absolute sale of the property, after proceedings being had under the Regulation for foreclosure in January, 1880. But the plaintiff-respondent was mistaken in thinking and acting at that time as if he was “a person then entitled” to this alternative remedy. He was not so; and for this reason he was non-suited in that action, because it had been brought “prematurely,” that is to say, before the expiry of the two years term stipulated for the payment of the principal debt in the deed of mortgage. This decree was correct, being based on the principle laid down on this subject in many leading cases, and most

recently in the Allahabad High Court's ruling in the case exactly analogous to the present,—*Imdad Husain v. Mannu Lal* (1). Therefore the plaintiff-respondent was not, when he sued in 1880, a person entitled to more than one remedy. He had then only the remedy he is seeking to enforce in this present action. His remedy by way of foreclosure and suit to make the mortgage and absolute sale was at that time inchoate only, and had not accrued completely to the mortgagee. There is of course no room for the contention that the plaintiff's "cause of action" was not identical in both suits. It was so, being nothing else than his obligor's breach of contract to pay the stipulated interest at the time fixed for such payment by the bond. Under these circumstances, and in this view of the law, the plea based on the last clause of s. 43 of the Civil Code cannot be allowed, and the decree of the lower appellate Court must be affirmed. The appeal is dismissed with costs.

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Appeal dismissed.

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— 1859—VIII, s. 5—*What constitutes "dwelling" within the meaning of that section—Commission, under a will, payable to manager of joint estate.*] A testator bequeathed the income of his "altamgha," "zamindari," and "thikadari lands" situate in the districts of Delhi, Hissar, and Bulandshahr, to his five sons in equal shares, and to their issue; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as "altamgha" were in the Bulandshahr district within the local limits of the jurisdiction of the Civil Court of Meerut; and on them an establishment was maintained at the expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Delhi. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses "with mutual consent in the altamgha and zamindari;" also that certain memorials of the testator were to be retained by the manager at Bilaspur. At this place the manager used to stay occasionally, though travelling for the most part about the estate during the cold weather.

No particular place for rendering the yearly accounts was fixed, either by contract or in practice, but they were rendered by the manager to the sharers at different times and in different places, including Delhi, Bilaspur, and Hansi; at which last place, it being the *sadr* station of Hissar, the older records of the estate were kept.

When this suit was brought, the manager was actually residing at the hill station of Mussoori, in the Saharanpur district, for the hot weather, and in his answer he stated that the unsettled accounts were open to inspection by the sharers at Bilaspur.

Held that a person might "dwell," within the meaning of Act VIII of 1859, s. 5, at more places than one; and that, on the evidence, this

manager so dwelt at Bilaspur as to make him subject to the jurisdiction of the Meerut Court in this suit. It was, accordingly, not necessary to consider whether he was or was not also subject to that Court's jurisdiction by reason of the cause of action having arisen within its local limits; nor was it necessary to consider whether he had, or had not, such a dwelling place at Hansi, as would have rendered him subject to the jurisdiction of the Hissar (Punjab) Courts.

Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing or varying the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was held to be settled by the indication of the letter made of calculating in the will.

Sophia Orde v. Alexander Skinner

ACTS—1859—VIII s. 13—*Suit for money secured by the mortgage of immoveable property situate partly in the Family Domains of the Maharaja of Benares—Sale in execution—Fraudulent representation by decree-holder—Sale of decree enforcing hypothecation of immoveable property.* A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the district of Benares, and of immoveable property situate within the limits of the Family Domains of the Maharaj of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property; and he was authorised to proceed withit, under the provisions of s. 13 of Act VIII of 1859, by the High Court, in concurrence with the Board of Revenue. He accordingly proceeded with the suit, and on the 18th November, 1874, gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the Family Domains of the Maharaja of Benares to sale, this decree was sent for execution to the Subordinate Judge at Khond, within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September 1877. Subsequently the defendants in the present suit, who held decrees for money against *H*, one of the plaintiffs in the suit above-mentioned, applied to the Subordinate Judge of Benares for the attachment and sale of *H*'s interest in the decrees above-mentioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September, 1877, had been set aside. Such interest was accordingly put up for sale on the 29th May, 1878, at Benares, by the Subordinate Judge of Benares, and was purchased by the plaintiffs in the present suit, who were induced to purchase by such false representation. The plaintiffs in the present suit claimed the avoidance of the sale of the 29th May, 1878, and the refund of the purchase-money on the ground that they were induced to purchase by such false representation, and on the ground that the sale of the interest of *H* in the decree of the 18th November, 1874, being of the nature of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares, could not legally be sold at Benares by the Benares Court. *Held* that such false representation must be held to constitute in law such fraud as vitiated the sale of the 29th May, 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situate within the Family Domains of the Maharaja of Benares. Also that [following *S. A. No. 969 of 1877*, decided the 14th December, 1877] the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situate within the limits of the

Family Domains of the Maharsja of Benares, those Domains not constituting a district within the meaning of that section.

Raghu Nath Das v. Kakkan Mal

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ACTS—1859—VIII, ss. 222, 256, 257—*Sale in execution—Order of attachment and sale notifications not signed by Judge but by munsarim—Sale set aside—Suit to have sale confirmed—Equitable estoppel.*] On the 21st August, 1876, certain immoveable property belonging to *M* was put up for sale and was purchased by *E*. On the 20th April, 1877, such sale was set aside under s. 256 of Act VIII of 1859, on the ground that the order attaching such property and the notifications of sale had not, as required by s. 222, been signed by the Court executing the decree, but by the munsarim of the Court. On the 27th June, 1877, *M* conveyed such property to *H*, who purchased it *bond fide* and for value, and satisfied the incumbrances existing thereon. On the 15th April, 1878, *E* sued *H* and *M* to have the order setting aside, such sale set aside and to have such sale confirmed in his favour, on the ground that it had been improperly set aside under s. 256 of Act VIII of 1859, the judgment-debtor not having been prejudiced by the irregularities in respect whereof such sale had been set aside. *Held* by OLDFIELD, J., that although such sale might have been improperly set aside, yet inasmuch as the order of attachment and the notification of sale could have no legal effect, having been signed by the munsarim of the Court executing the decree, and not by the Court as required by s. 222 of Act VIII of 1859, and inasmuch as it would be inequitable, after the incumbrances on such property had been satisfied and the state of things changed, to allow *E*, after standing by for a year, and permitting dealings with the property, to come in and take advantage of the change of circumstances, and obtain a property become much more valuable at the price he originally offered, *E* ought not to obtain the relief which he sought.

Held by STRAIGHT, J., that the fact that the Court executing the decree had not signed the order of attachment and the notifications of sale vitiated the proceedings in execution *ab initio*, and rendered the sale which *E* desired to have confirmed void, and *E*'s suit therefore failed, and had properly been dismissed.

Ram Dial v. Mahtab Singh

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ss. 249, 259. *See* Sale in execution

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ss. 256, 257—*Sale in execution of decree—Order setting aside sale—Suit to set aside such order.*] Certain immoveable property was put up for sale in the execution of *B*'s decree and was purchased by him. Subsequently, on the same day, such property was put for sale in the execution of *S*'s decree and was purchased by him. *B* objected to the confirmation of the sale to *S* on the ground that *S*'s decree had been satisfied previously to such sale, and the Court executing the decree made an order setting aside such sale on that ground. *S* thereupon sued *B* to have such order set aside, and to have such sale confirmed, and to obtain possession of such property. *Held* that, inasmuch as such order had not been made under s. 257 of Act VIII of 1859, but had been made at the instance of a purchaser under another decree, and *B*'s decree, as a matter of fact, had not been satisfied, *S*'s suit to have such order set aside was maintainable.

The lower Court having given *S* a decree awarding possession of such property, as well as a declaration of his right to have such sale confirmed, the High Court set aside so much of that decree as awarded possession of such property.

Sangam Ram v. Sheobart Bhagat

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ss. 256, 257—*Sale in execution of decree—Suit to set aside order setting aside sale.*] The Court executing a decree having made an order setting aside a sale under Act VIII of 1859 of immoveable property in the execution of the decree, the purchaser at such sale

sued the decree-holder and the judgment-debtor to have such order set aside and to have such sale confirmed in his favour. *Held* (OLDFIELD, J., dissenting) that the suit was maintainable, the provisions of s. 257 precluding an appeal from an order setting aside a sale, and not a suit to contest the validity of such an order, and that the order setting aside the sale in this case being *ultra vires*, the auction-purchaser was entitled to the relief he claimed.

Diwan Singh v. Bharat Singh 206

ACTS—1859—XIII—*Masters and workmen—Breach of contract on the part of workmen—"Station."*] An employer of workmen residing and carrying on business in the city of Mirzapur, alleging that he had advanced money to certain workmen on the understanding that they would work for him and no one else until they had repaid such money, and that they had broken such contract by leaving his employment, made a complaint against such workmen under Act XIII of 1859, which had been extended to the "station" of Mirzapur by the Local Government. It appeared that such money was advanced by way of loan, and without any reference to the wages of such workmen or the payment for the work performed by them, and that no deduction on account of such advance was ever made from their wages or the payments made to them. *Held*, that the contract between the parties was something quite different from any contract contemplated by Act XIII of 1859, and that Act was therefore not applicable.

Held also that it was doubtful whether that Act applied locally, as it was not shown that the city of Mirzapur was comprised within the "station" of Mirzapur.

In the matter of the petition of Ram Prasad v. Dirgpal 744

XIV. See Act XV of 1877 340

1860—XXVII, ss. 5, 6—*Certificate for collection of debts—Security—Appeal.*] No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of 1860, lies under that Act to the High Court. *In the matter of the petition of Rukmin* followed.

In the matter of the petition of Srimati Paddo Sundari Dasi. 304

XLV, ss. 75, 457, 511—*Previous conviction—Attempt to commit offence.*] A person, having been convicted of an offence punishable under s. 457 (Ch. XVII) of the Indian Penal Code, was subsequently guilty of an attempt to commit such an offence. *Held* that the provisions of s. 75 of the Indian Penal Code were not applicable to such person.

Empress of India v. Ram Dial 773

ss. 187, 188—*Landholder, duty of—Neglect to aid a public servant—Disobedience to order by public servant—Act X of 1872 (Criminal Procedure Code), ss. 90, 91.*] A Magistrate directed a landholder "to find a clue" in a case of theft "within fifteen days, and to assist the police." *Held* that such order was not authorised by ss. 90 and 91 of Act X of 1872, and the conviction of such landholder under ss. 187 and 188 of the Penal Code for disobedience to such orders was not maintainable.

Empress of India v. Bakhshi Ram 201

s. 201—*Causing disappearance of evidence of an offence.*] *Held* that it is necessary, in order to justify a conviction under s. 201 of the Indian Penal Code, that an offence for which some person has been convicted, or is criminally responsible, should have been committed.

Empress of India v. Abdul Kadir 279

s. 211—*False charge—Contempt—Prosecution—Charge—Act X of 1872 (Criminal Procedure Code), ss. 468, 473.*] B charged certain persons before a police officer with theft. Such charge was brought by the police to the notice of the Magistrate having jurisdiction, who directed the police to investigate into the truth of such charge. Having

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ascertained that such charge was false, such Magistrate took proceedings against *B* on a charge of making a false charge of an offence, an offence punishable under s. 211 of the Penal Code, and convicted him of that offence.

Held that, as such false charge was not preferred by *B* before such Magistrate, the offence of making it was not a contempt of such Magistrate's authority, and the provisions of ss. 468 and 473 of Act X of 1872 were inapplicable, and such Magistrate was not precluded from trying *B* himself, nor was his sanction or that of some superior Court necessary for *B*'s trial by another officer—*Empress v. Kashmiri Lal* distinguished.

Observations by STUART, C. J., on the careless manner in which the charge in this case was framed.

Empress of India v. Baldeo 322
 ACTS—1860—XLV, s. 214—*Construction of Act with reference to Bill—Compoundable offences—Cheating—Forgery—Act X of 1872 (Criminal Procedure Code), s. 188.*] Cheating and forgery are not offences which may be lawfully compounded. Where a Magistrate decided that certain offences could be lawfully compounded, having regard to a Bill which the Legislature had brought in amending s. 214 of Act XLV of 1860, *held* that it was irregular for such Magistrate to allow his decision to be guided by anything in a Bill that had not become law, and it was his duty to have interpreted that section without reference to merely contemplated legislation.

In the matter of the petition of Raunak Husain *v.* Harbans Singh 283

—s. 221—*Village watchman—Act XVI of 1873 (N.-W. P. Village and Road Police Act), s. 8—Act X of 1872 (Criminal Procedure Code), s. 92.*] A chaukidar or village-watchman is not legally bound as a public servant to apprehend a person accused of committing murder outside the village of which he is chaukidar, such person not being a proclaimed offender, and not having been found by him in the act of committing such murder; and consequently such chaukidar, if he refuses to apprehend such person on such charge at the instance of a private person, is not punishable under s. 221 of the Penal Code.

Empress of India v. Kallu 60

—s. 293—*Obscene book—Destruction of book by order of Criminal Court—Act X of 1872 (Criminal Procedure Code), s. 418.*] A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage.

The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious controversy. *Held* that the excessive obscenity of such books took away the protection which their controversial nature might otherwise have afforded them. Also that the intention of the seller and distributor must be gathered from the character of the matter contained in such books. As he had chosen to sell and distribute what was obscene, it must be presumed that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It was not sufficient for him to say that his intentions were good. It was his public act that must be the test of his intentions; and having done an unlawful act, it was no answer to say that he thought it lawful. *Queen v. Hicklin* and *Steele v. Brannan* followed.

At the conclusion of the trial of a person for the sale and distribution of obscene books, the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under s. 418 of the Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order.

Empress of India v. Indarman 837

- ACT—1860—XVL, ss. 299, 300, 302, 304A., 325—*Murder—Culpable homicide not amounting to murder—Causing death by rash or negligent act—Grievous hurt.*] Where a person struck another a blow which caused death, without any intention of causing death, or of causing such bodily injury as was likely to cause death, or the knowledge that he was likely by such act to cause death, but with the intention of causing grievous hurt, *held* that the offence of which such person was guilty was not the offence of causing death by a rash act, but the offence of voluntarily causing grievous hurt.
- Nidarmarti Nagabhushanam, Queen v. Pemkoer; Queen v. Man; Empress v. Ketabdi Mundul; Empress v. Foz, and Empress v. O'Brien* followed.
- The offences of murder, culpable homicide not amounting to murder and causing death by a rash or negligent act distinguished. 776
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- Empress of India v. Idu Beg* 776
- s. 302—*Murder—“Corpus delicti.”*] The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of the murder.
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- Empress of India v. Bhagirath* 383
- s. 304A, 323—*Causing death by a rash or negligent act—Voluntarily causing hurt.*] A person without the intention to cause death, or to cause such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, or the intention to cause grievous hurt, or the knowledge that he was likely by his act to cause grievous hurt, but with the intention of causing hurt, caused the death of another person by throwing a piece of a brick at him, which struck him in the region of the spleen and ruptured it, the spleen being diseased. *Held* that the offence committed was not the offence of causing death by a rash or negligent act, but the offence of voluntarily causing hurt.
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- Empress of India v. Randhir Singh* 597
- s. 379, 411—*Abetment of theft—Receiving stolen property—Joint undivided Hindu family.*] A Hindu, intending to separate himself from his family, emigrated to Demerara as a coolie. After an absence of thirty years, he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family he lived in commensality with it, but he did not treat such property as joint family property, but as his own property. *Held* that such property was his sole property, and his brother was not a joint owner of it, and could property be convicted of theft in respect of it.
- It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.
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- Empress of India v. Sita Ram Rai* 181
- s. 499—*Defamation—Publication.*] M, a medical man and editor of a medical journal published monthly, said in such journal of an advertisement published by H, another medical man, in which H solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed.—“The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officers serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional.” *Held* that, inasmuch as such advertisement had the effect of making such hospital a “public question,” and of submitting it to the “judgment of the public,” and M had expressed himself in good faith, M was within the *Third and Sixth Exceptions*,

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respectively, to s. 499 of the Penal Code. *Held* also that *M* came within the *Ninth Exception* to that section.

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is a publication of such defamatory matter at Allahabad.

The publisher of a newspaper is responsible for defamatory matter published in such paper, whether he knows the contents of such paper or not.

Empress of India v. McLeod.

- ACTS—1860—XLV, s. 499—*Defamation—Good faith.*] *C* was put out of caste by a panchayat of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of such panchayat, circulated a letter to the members of their caste generally, in which, stating that *C* and such woman had been put out of caste, and the reason for the same, and requesting the members of the caste not to receive them into their houses or to eat with them, they made certain statements applying equally to *C* or such woman. Such statements were defamatory within the meaning of s. 499 of the Indian Penal Code. *Held* that, if such persons were careless enough to use language which was applicable to *C*, they did so at their peril, and they could not escape the responsibility of having defamed *C* by saying that they intended such language to apply to such woman. *Held* also, on the question whether such persons had acted in good faith, that, looking to the character of such letter, the circumstances under which it was written, and to the fact that *C* had been put out of caste for the reason alleged, had such persons contented themselves with announcing the determination of the panchayat, and the grounds upon which such determination was based, they would have been protected; but, inasmuch as they did not so content themselves, but went further and made false and uncalled for statements regarding *C*, they had rightly been held not to have acted in good faith. 342

Empress of India v. Ramanand

- 1861—IX—*Custody of minor—Minor wife.*] *P*, whose minor wife had refused to return to cohabitation with him on the ground that he was out of caste in consequence of having committed a criminal offence, applied to the District Court under Act IX of 1861 for the custody of her person. *Held* that that Act did not apply to such a case. 664

Pakhandu v. Manki

-] Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court. 506

Balmakund v. Janki

- 1864—XVI. See Act III of 1877, s. 50 403
 —1865—X, s. 331. See Hindu Law 505
 —1865—XI, s. 6—*Suit for fruit upon trees—Suit for compensation for the wrongful taking of fruit upon trees—Immoveable property—Suit cognizable in Small Cause Court—Act III of 1877 (Registration Act), s. 3.*] When the damage or demand does not exceed in amount or value the sum of five hundred rupees, a suit for the fruit upon trees, or damages in lieu thereof, is a suit cognizable in a Mufassal Court of Small Causes, the fruit upon trees not being immoveable property, but being moveable property, within the meaning of s. 6 of Act XI of 1865. 55

In the matter of the petition of Nasir Khan *v.* Karamat Khan 168

- , ss. 6 (8), 12—*Jurisdiction of Small Cause Court—Compensation for personal injury—Actual pecuniary damage.*] The plaintiff in a suit for compensation for malicious prosecution claimed Rs. 200 as compensation for the mental annoyance caused him by such

prosecution, and Rs. 25 the actual expense incurred by him in defending himself from the charge made against him. *Held*, with reference to s. 6 (3) and s. 12 of Act XI of 1865, that the suit being one for the recovery of damages on account of an alleged personal injury, from which actual pecuniary damage had resulted, it was cognizable and should have been instituted in the Court of Small Causes having local jurisdiction. *Gunga Narain v. Gudadhur Chowdhry and Brojo Soondur v. Eshan Chunder* followed.

<i>Debi Singh v. Hanuman Upadhyas</i>	747
ACTS—1868—I, s. 2 (5). See Act III of 1877, ss. 17, 49	423
XV of 1877, s. 28	435

—1869—XVIII, s. 3 (5), (25), and sch. ii, No. 11—*Promissory Note—Bond—Agreement—Interest—Penalty.*] The defendant having borrowed fifty rupees from the plaintiff, gave him on the 9th November, 1878, an instrument which was in effect as follows:—"B (defendant) writes this "*rukka*" in favor of A (plaintiff) for Rs. 50 cash received, to be repaid on the 13th November, 1878: in the event of default, he shall pay interest at one rupee per diem. *Held* (STUART, C. J., dissenting) that such instrument was a "promissory note" within the meaning of the Stamp Act of 1869, and not a "bond" or "an agreement not otherwise provided for," within the meaning of that Act.

Held also that, looking to the whole instrument, it was equitable to hold that the term "interest" was not intended to mean interest in the strict sense of that term, but a penalty, and the amount of interest should be so treated, and a reasonable amount only be allowed. The observations of Pontifex, J., in *Bichook Nath Panday v. Ram Lochan Singh* concurred in.

<i>Bansidhar v. Bu Ali Khan</i>	260
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—s. 3 (25), sch. ii, No. 5—*Note or memorandum acknowledging debt—Promissory Note—Insufficiently stamped document, admissibility in evidence of.*] The plaintiff sold and delivered certain goods to the defendant. The defendant gave the plaintiff, in respect of the price of such goods, the following instrument: "Agra, 14th November, 1877. Due to K, cloth-merchant, the sum of Rs. 200 only, to be paid next January, 1878." This instrument was stamped with a one-anna adhesive stamp. The plaintiff claimed in the present suit from the defendant Rs. 200, and interest on that amount at twelve per cent. per annum from the 14th November, 1877, to the date of suit. *Held* by STUART, C. J., and PEARSON, J., OLDFIELD, J., and STRAIGHT, J., treating the suit as one for a debt, that, although such instrument was not admissible in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgment of such debt.

Per SPANKIE, J., treating the suit as based upon a promissory note, that such instrument, being insufficiently stamped, was not admissible in evidence.

<i>Kanhaya Lal v. Stowell</i>	581
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—ss. 39, 40—*Promissory Note—Evidence.*] A promissory note, not payable on demand, executed on unstamped paper, was brought to a Collector, under s. 39 of Act XVIII of 1869, for adjudication as to the proper stamp, who, upon the payments provided in that section having been made, made the endorsement thereon provided in that section. *Held* that the irregularity of the Collector in making such endorsement did not render such promissory note inadmissible in evidence.

<i>Girdhari Das v. Jagan Nath</i>	115
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- ACTS—1870—VII, s. 7, cl. 1, and s. 17—*Suit for specific moveable property or for compensation—Court-fees—“Multifarious Suit.”*] *A*, to whom a certificate of administration in respect of the property of a minor had been granted in succession to *B*, whose certificate had been revoked, sued *B* claiming the delivery of specific moveable property of various kinds belonging to the minor, which had been intrusted to *B*, and *B* detained, or the value of each kind of property as compensation in case of non-delivery. *Held* that the suit did not embrace “distinct subjects” within the meaning of s. 17 of the Court Fees Act, 1870, and the court-fees payable in respect of the plaint in the suit should be computed under cl. i., s. 7 of that Act, according to the total value of the claim.
- Amar Nath v. Thakur Das 131
- ss. 7, 8, 17, sch. i, art.—*Multifarious suit—Court-fees on plaint and memorandum of appeal.*] The rule laid down in s. 17 of the Court Fees Act regarding multifarious suits is subject to the proviso at the end of art 1, sch. i. of that Act, and the maximum fee leviable on the plaint or memorandum of appeal in such a suit is under that proviso Rs. 3,000.
- Raghobir Singh v. Dharam Kuar 108
- XI, s. 2. See Act X of 1871, ss. 19, 63 404
- 1871—VIII. See Act XIX of 1843 488
- s. 17, cl. (2)—*Registration—Mortgage—Suit on unregistered bond charging immoveable property.*] The obligor of a bond bearing date the 20th January 1873, agreed to pay the obligee Rs. 80, together with interest on that amount at the rate of Rs. 2 per cent. per month, between the 2nd April 1874 and the 1st May 1874, and hypothecated immoveable property as collateral security for such payment. On the 16th February 1879, the obligee sued the obligor on the bond to recover Rs. 196-8-0, being the principal amount and interest, from the hypothecated property. *Held* by the majority of the Full Bench (STUART, C. J., dissenting) that, for the purpose of registration, the value of the right assigned by the bond to the obligee in the property should be estimated by the amount secured for certain by the hypothecation, and, that amount exceeding Rs. 100, the bond should have been registered.
- Per STUART, C. J.—That, for that purpose, the value of that right should be estimated by the principal amount of the bond, and, that amount being under Rs. 100, the bond did not require to be registered. *Nanabin Lakshman v. Anant Babaji and Narasayya Chetti v. Guruswappa Chetti* followed.
- Per PEARSON, J, OLDFIELD, J, and STRAIGHT, J.—That a suit on a bond for money charged thereby on immoveable property must, where the bond is not admissible in evidence because it is unregistered, fail.
- Himmat Singh v. Sewa Ram 157
- ss. 17, 18.] *N* agreed by an instrument in writing called a “*sattah*” in consideration of a loan of Rs. 99-8-0, that *B* should have the right of cultivating indigo on certain land from a certain date for a certain period; that if she failed to make over to him any portion of such land, or interfered with his cultivation of any portion of it, she should be responsible in damages for the loss occasioned to *B* in respect of such default or interference at the rate of Rs. 40 per bigha, and for the repayment of such loan; “that, if she failed to pay, *B* was at liberty to recover from her person and property; and that, until the conditions of the agreement were fulfilled, she hypothecated her four-anna share in mauza *B*.” *B* sued *N* upon the “*sattah*” to recover Rs. 1,069-6-0, being the amount of such loan and damages, by the sale of such four-anna share, such suit being founded on a breach of the agreement. *Held per* STUART, C. J., that, inasmuch as the value relating

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to the immoveable property hypothecated in the "satta" was simply Rs. 99-8-0, without any stipulation as to interest or any other payment by which that sum might be augmented, the damages stipulated for depending upon a contingency which might or might not happen, and respecting which nothing could be anticipated at the time of registration, the instrument did not, under Act VIII of 1871, s. 17, require registration. *Darshan Singh v. Hanwanta* observed on.

Per **OLDFIELD, J.**—That, the only certain sum secured by the "*sattah*" being Rs. 99-8-0, the instrument did not require registration under that Act, but it could not be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

Basant Lal v. Tapesbri Rai		1
ACTS—1871—IX.	See Act XV of 1877.	340
	s. 2	415
	s. 29. See Act XV of 1877, s. 28	435
	s. 29 and sch. ii, arts. 14, 15, 118, 145. See Res	
judicata		40
	sch. ii, No. 44. See Hindu Law	738
	No. 62. See Act XV of 1877, s. 2, sch. ii, No. 64	148

No. 167—Execution of decree—Application to enforce decree—Oral application for proclamation of sale.] An oral application, on a sale of immoveable property in the execution of a decree having been adjourned, for the fixing of a fresh date for the sale is an application to enforce the decree, within the meaning of art. 167, sch. ii of Act IX of 1871. An application to enforce the decree made within three years from the date of such an oral application will therefore be within time.

Amar Singh v. Tika See Act XV of 1877, sch. ii, No. 179 . . . 139
 320

X, ss. 19, 63—*Illicit possession of liquor—Guilty knowledge—Presumption—Act XI of 1870, s. 2—“Ser.”* *Held*, in a prosecution under ss. 19 and 63 of Act X of 1871, that the definition of “ser” given in s. 2 of Act XI of 1870 was not so intelligible and clear as to be capable of general application, and that it did not supersede the local customary weight of a ser. *Held*, therefore, the local customary weight of a ser being ninety-five tolahs (the Government ser weighing eighty-tolahs), and the accused having been found in possession of ninety-six tolahs only, that the excess of one tolah over the local weight was not such as to warrant the presumption of the guilt of the accused.

Empress of India v. Hait Ram.
Empress of India v. Cheda Khan 404
 ———— 1872— I, s. 24— *Confession— Act X of 1872 (Criminal Proce-*
dure Code, ss. 122, 346]. A confession does not become irrelevant
 merely because the memorandum required by law to be attached thereto
 by the Magistrate taking it has not been written in the exact form pre-
 scribed.

Empress of India v. Bhairon Singh 338

—s. 91.—*Promise to pay balance found due on accounts stated in instalments—Promissory Note—Note of agreement in account book—Evidence of terms of agreement—Relinquishment of part of claim—Act X of 1877 (Civil Procedure Code), s. 43.* In 1876 accounts were stated between *B* and *D*, and a balance of Rs. 800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. *B* at the same time noted in his account-book that such balance was “payable in four instalments of Rs. 200 yearly.” In July 1879, *B* sued *D* upon such instrument for the balance of the first instalment. The Court trying

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this suit refused to receive such instrument in evidence on the ground that it was a promissory note, and as such was improperly stamped. Thereupon *B* applied for and obtained permission to withdraw from the suit, with liberty to bring a fresh one for the original debt. In October 1879, *B* again sued *D*, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account-book. He obtained a decree in this suit for the amount claimed by him. In 1880 *B* again sued *D*, claiming the amount of the third instalment, again basing his claim upon such note.

Held by SPANKIE, J., that the suit last-mentioned was barred by the provisions of s. 43 of Act X of 1877, inasmuch as *B* should in the second suit brought by him against *D* have claimed the balance of the money found due from *D* to him upon the accounts stated between them, instead of claiming the balance of the instalments due.

Held by OLDFIELD, J., that such suit was not so barred, the causes of action therein and in the former suit being different.

Held by the Court that the agreement by *D* to pay the balance found due from him to *B* on accounts stated between them in instalments of Rs. 200 annually could not be proved by the note made by *B* in his account-book, but could only be proved by the promissory note.

Benarsi Das v. Bhikari Das 717

ACTS—1872—I, s. 121—*Witness—Judge or Magistrate—Power of Sessions Judge to compel Magistrate to give evidence.*] A Sessions Judge, finding in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the district objected to this proceeding of the Sessions Judge contending that it was "contrary to law." The Sessions Judge referred the question whether or not his proceeding was contrary to law to the High Court.

Per STUART, C. J., PEARSON, J., OLDFIELD, J., and STRAIGHT, J.—That the privilege given by s. 121 of Act I of 1872 is the privilege of the witness, i.e., of the Judge or Magistrate of whom the question is asked: if he waives such privilege, or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not having been taken by the Subordinate Magistrate but the Magistrate of the district, should be answered accordingly.

Per SPANKIE, J.—That a Sessions Judge, while trying a case, cannot compel a committing Magistrate to answer questions as to his own conduct in Court as such Magistrate.

Empress of India v. Chidda Khan 573

IX, s. 2 (d) and s. 25 (2).—*Agreement without consideration.*] The plaintiff sued to establish an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a bazar in which they occupied shops, in consideration of the plaintiff having expended money in the construction of such bazar. Such money had not been expended by the plaintiff at the request of the defendants, nor had it been expended by him for them voluntarily, but it had been expended by him voluntarily for third parties. *Held* that such expenditure was not any consideration for the agreement within the meaning of s. 2 (d) of Act IX of 1872, and the agreement did not fall within cl. (2), s. 25 of that Act, and was void for want of consideration.

Durga Prasad v. Baldeo 221

Void agreement—Immoral consideration—Agreement without consideration—Past cohabitation.] Past cohabitation would not be an immoral consideration, if consideration

it can properly be called, for a promise to pay a woman an allowance. Such a promise, however, is to be regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary.

- Dhiraj Kuar v. Bikramajit Singh 787
- ACTS—1872—IX, s. 25(3)—*Promise to pay a debt barred by limitation—judgment-debt.*] The holder of a decree for money, dated the 22nd June 1868, applied for execution on the 23rd February 1869. In September 1869, before the decree had been executed, the judgment debtor, admitting that a certain amount was due under the decree, agreed to pay such amount by instalments; and that, if default were made, the decree should be executed for the whole amount thereof. Default having been made early in 1873, the decree-holder applied at once for execution of the decree. On the 5th May 1873, a petition, signed by the judgment-debtor, was preferred on his behalf to the Court executing the decree, such petition being in effect as followed: "Execution case for Rs. 6,839-16-3: in this case the decree-holder has filed an application for execution of his decree in consequence of a default in payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to the decree-holder's demand: in future he will not fail to pay instalments: he has written a letter to plaintiff asking him to pardon his breach of promise, and to agree to realize the decree-money by the instalments formerly fixed, and to stay execution of the decree for the present: the decree-holder has granted this request: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and execution of the decree be postponed for the present: in case of default being made in payment of two instalments in succession, the decree-holder will be at liberty to realize the balance of the decree-money with interest at twelve per cent. per annum." At the time such petition was preferred execution of the decree was barred by limitation. *Held* that a "debt" within the meaning of s. 25 (3) of Act IX of 1872 includes a "judgment-debt" and such petition was a promise to pay a debt barred by limitation within the meaning of that law, and a suit founded on such petition to recover the balance of the money due under the decree was maintainable.

Billings v. The Uncovenanted Service Bank 781

ss. 69, 70. *See* Jurisdiction 66

s. 133—*Principal and surety—Discharge of surety by variance in terms of contract.*] A *kabuliyat* whereby a lessee agrees, without the consent of the person guaranteeing the payment of the rent agreed to be paid under a former *kabuliyat*, that he will pay rent at a higher rate than that agreed to be paid in such former *kabuliyat*, amounts to a variance of the terms of the contract of guarantee, and discharges the lessee's surety in respect of arrears of rent accruing subsequent to such variance.

Khatun Bibi v. Abdullah 9

X, ss. 33, 63—*Irregular commitment—Place of inquiry and trial.*] S. 33 of Act X of 1872 contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 63 of that Act, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such commitment; and not of a case which has been inquired into in a district in which it was not committed, being committed to the proper Court of Session as indicated by that section, by a particular Magistrate duly empowered by law to make such a commitment. Consequently, where a Magistrate inquires into and commits for trial of an offence which has not been committed in his district, and the Court of Session for that

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district accepts such commitment because the prisoner has not been prejudiced thereby, and tries him for such offence, the proceedings in such case are illegal *ab initio*.

Empress of India v. Jagan Nath

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ACTS—1872—X, s. 47—*Magistrate of the district—Power to withdraw or refer cases.*] Magistrates of districts should exercise the powers conferred on them by s. 47 of Act X of 1872 only when it is absolutely necessary for the interests of justice that they should do so; and when one of the parties to a case applies to have it withdrawn from the Magistrate inquiring into or trying it and referred to another Magistrate, the Magistrate of the district should give the other party notice of such application, and an opportunity of showing cause why such application should not be granted.

Where the accused in a criminal case applied to the Magistrate of the district, after the evidence of the complainant and his witnesses had been taken, to withdraw such case from the Subordinate Magistrate trying it and to try it himself, such application not containing any sufficient reason justifying the granting of the same, and the Magistrate of the district, without giving the complainant notice of such application or opportunity of showing cause against it, and without stating any reason, withdraw such case from the Subordinate Magistrate trying it and referred it to another for trial, the High Court set aside the order of the District Magistrate and of the Magistrate to whom such case was referred for trial, and directed the Magistrate from whom it had been withdrawn to proceed with it.

In the matter of the petition of *Umransingh v. Fakir Chand*

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ss. 90, 91. See Act XLV of 1860, ss. 187, 188 201
 ss. 92. See Act XLV of 1860, s. 221 60
 ss. 122, 346. See Act I of 1872, s. 24 338
 ss. 188. See Act XLV of 1860, s. 214 283
 ss. 216, 220, 291—*Omission to prepare charge—*

Acquittal—Discharge—Revival of prosecution.] A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion any failure of justice. *Held*, with reference to s. 216 of Act X of 1872, Explanation I, that such omission did not invalidate the order of acquittal of such person and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence.

Empress of India v. Gurdu

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ss. 283, 362.—*Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings.*]

Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in Court or by commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code, *held* that the conviction of the accused person must be set aside, and the case be re-opened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law.

In the matter of the petition of *Sat Narain Singh*

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ss. 297, 491, 492. See High Court, powers of revision 545

ss. 314, 453, 454.—*Convictions of several offences—*

Maximum term of punishment—Joinder of charges.] Where a person who is accused of several offences of the same kind is tried for each of such offences separately by a Magistrate, the aggregate punishment which such Magistrate can inflict on him, in respect of such offences, is not limited to twice the amount which he is by his ordinary jurisdiction, competent to inflict, but such Magistrate can inflict on him for each

offence the punishment which he is by his ordinary jurisdiction competent to inflict.

A person accused of theft on the 1st August and of house-breaking by night in order to steal on the 2nd August, both offences involving a stealing from the same person, was charged and tried by a Magistrate of the first class at the same time for such offences, and sentenced to rigorous imprisonment for two years for each of such offences: *Held* that the joinder of the charges was regular under s. 463 of Act X of 1872, and the punishment was within the limits prescribed by s. 314.

Empress v. Umeda observed on by STRAIGHT, J.

In the matter of Daulatia	305
ACTS—1872—X, s. 418. See Act XLV of 1860, s. 293	837

ss. 468, 471.—*Prosecution for giving false evidence—Sanction.* An instruction to the Magistrate of the District by the Court of Session, contained in the concluding sentence of its judgment in a case tried by it, to prosecute a person for giving false evidence before it in such case, does not amount to sanction to a prosecution of such person for such offence, within the meaning of s. 468 of Act X of 1872, that section supposing a complaint, or at least an application for sanction for a complaint.

Where a Court thinks that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, or 469 of Act X of 1872, it should proceed under s. 471 of that Act.

Attention of the Court of Session in this case directed to *Queen v. Baijo Lal*.

<i>Empress of India v. Gobardhan Das</i>	62
ss. 468, 469. See High Court, powers of revision	508
ss. 468, 473. See Act XLV of 1860, s. 211	322
ss. 491, 492. See High Court, powers of revision	545
—1873—XVI, s. 8. See Act XLV of 1860, s. 221	60
—XVIII, ss. 10, 36, 39, 95. See Jurisdiction	81

ss. 12, 21.—*Tenant-at-will—Enhancement of rent—Agreement to pay enhanced rent.* The patwari of a village entered in his diary that a tenant-at-will had agreed with the landholder to pay enhanced rent, but the agreement was not recorded, the terms as to rent were not stated, and there was nothing to show that such tenant had assented to such entry. *Held* that there was no record of such agreement, within the meaning of s. 21 of Act XVIII of 1873.

<i>Bhawani v. Abdullah Khan</i>	365
ss. 36, 39. See Jurisdiction	521
ss. 44, 93. See Jurisdiction	85

s. 56.—*Rent—Produce of land—Hypothecation—Purchaser.* The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by s. 56 of Act XVIII of 1873, takes such produce subject to such lien. S. A. No. 1893 of 1870, decided on the 4th February 1871, and *Achul v. Gunga Pershad* followed.

Kinlock v. The Collector of Etawah as Manager of mauza Samayan on behalf of the Court of Wards

ss. 93, 95, 148. See Act X of 1877, s. 13	493
s. 93 (a). See Jurisdiction	61
s. 93 (g). See Jurisdiction	37
ss. 148, 189.— <i>Landholder and Tenant—Suit on which</i>	66, 144

right to receive rent is disputed—Determination of such right—Determination of proprietary right. C sued J for the rent for certain land, alleging that he was the tenant of such land and J was his sub-tenant. J disputed C's right to receive rent for such land, alleging that he was not his sub-tenant, but S's, and had paid such rent to S. Under the provisions of s. 148 of Act XVIII of 1873, S was made a party to the suit. The Collector decided on appeal in the suit that S and not C was

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the tenant of such land, and *J* was her sub-tenant, and not *C's*, and had paid such rent to *S*. Held that there was no determination by the Collector of the title to such land but as incidental to the question who was entitled to receive the rent, and consequently the decision of the Collector was not appealable to the District Judge.

Chotu v. Jitan	68
ACTS—1873—XIX, ss. 82, 83, 87, 88, 89, 241. See Jurisdiction	367
ss. 108, 113, 114— <i>Partition—Hindu widow—Reversioners.</i>] A childless Hindu widow, who has succeeded to her deceased husband's share of a mahal, such share having been his separate property, and is recorded as a co-sharer of such mahal, is as much entitled, under s. 108 of Act XIX of 1873, as any other recorded co-sharer is, to claim a perfect partition of her share. The circumstance that she may after partition alienate her share, contrary to Hindu Law, will not bar her right as a co-sharer to partition. If she acts contrary to the Hindu Law in respect of her share, the reversioners will be at liberty to protect their own interests.	
Jhunna Kuar v. Chain Sukh	400
ss. 125. See Jurisdiction	818
ss. 194, 199, 204. See Act X of 1877, ss. 2, 424	20
1875—IX, s. 3— <i>Minor—Majority—Act XL of 1858.</i>] A minor of whose person or property a guardian has been appointed under Act XL of 1858 does not attain his majority when he completes the age of eighteen years, but when he completes the age of twenty-one years.	
Khwahish Ali v. Sarju Prasad Singh	598
1877—I, s. 27 (b). See Mortgage	706
111, s. 3. See Act XI of 1865, s. 6	168
ss. 17, 49— <i>Unregistered bond hypothecating immoveable property as collateral security—Admissibility of bond as evidence of the money-obligation—Effect of non-registration.</i>] A bond whereby a person obliges himself to pay money to another, and at the same time hypothecates immoveable property as collateral security for such payment, although the money-obligation is of the value of one hundred rupees, and the bond is not registered, can be received in evidence in support of a claim to enforce the money-obligation.	
In the matter of the petition of Sheo Dial v. Prag Dat Mier	229
ss. 17, 49— <i>Occupancy-tenancy—"Immoveable property"—Mortgage—Registration—Act I of 1868 (General Clauses Act), s. 2 (5).</i>] The obligee of a bond dated the 29th October 1869, sued to recover the amount due thereunder from the property hypothecated therein. By the terms of the bond the obligor agreed to pay the sum of Rs. 75 with interest at two rupees per cent. per mensem on the 12th May 1873. The amount thus secured exceeded Rs. 200. The property mortgaged was the tenant holding of the obligor. Held that the interest of a tenant in his holding was right or interest to or in immoveable property; that consequently such bond, which affirmed as a security a right of which the value, estimated by the amount secured, executed Rs. 100, ought to have been registered; that being unregistered it could not affect the "immoveable property comprised therein," or "be received in evidence of any transaction affecting" the same; and that the suit brought on the basis of such bond, for the enforcement of the lieu, must in the absence of the bond fail. <i>Himmat Singh v. Sewa Ram</i> followed.	
Nabira Rai v. Achampat Rai	422
s. 50— <i>Registered and unregistered documents—Act XVI of 1864.</i>] An unregistered document, executed before Act XVI of 1864 came into force, is not invalidated or postponed to a document registered under Act IX of 1871, under the <i>Explanation</i> given in s. 50 of Act III of 1877.	
Ram Baran Rai v. Murli Pandey	505
s. 50. See Act XIX of 1843	489

ACTS—1873—XIX, ss. 71, 73, 77—*Refusal to register on ground of denial of execution—Suit for registration.*] A Sub-Registrar refused to register a bond as the obligor denied the execution of it. The obligee, instead of applying to the Registrar under s. 73 of the Registration Act, in order to establish his right to have such bond registered, sued the obligor claiming a decree directing the registration of such bond. *Held* that such suit was not maintainable.

Ram Ghulam v. Chotey Lal observed upon.

Bhagwan Singh v. Khuda Bakhsh 397
ACTS—1877—X., s. 2—"Signed"—"Stamped." The expression "person referred to" in s. 2 of Act X of 1877, means person referred to in the subsequent sections of the Code, as being required to sign or verify certain documents, and it is not a condition precedent to such person being able to use a stamp that he should be unable to write his name.

The Maharaja of Benares v. Debi Dayal Noma 575

ss. 2, 366, 588 (18).—*Death of plaintiff-appellant—Order directing suit to abate—Appeal.*] An appellate Court rejected the application of the legal representative of a deceased sole plaintiff-appellant to enter his name in the place of such appellant on the record on the ground that such application had not been made within the time limited by law, and passed an order that the suit should abate. *Held* that the order of the Appellate Court, passed under the first paragraph of s. 366 of Act X. of 1877, not being appealable under cl. (18), s. 588 of that Act, nor being a decree within the terms of s. 2 from which a second appeal would lie, was not appealable.

Ahmad Ata v. Mata Badal Lal

ss. 2, 424—*Public officer—Notice of suit—Collector of the District—Court of Wards—Disqualified proprietor—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 194, 199, 204.*] A Collector, when acting under s. 204 of Act XIX of 1873, as the agent of the Court of Wards in respect of the estate of a disqualified person, is a public officer within the meaning of ss. 2 and 424 of Act X of 1877, and consequently, when sued for acts done in that capacity, is entitled to the notice of suit required by the latter section.

The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh, a minor, v. Munuvar 20

ss. 2, 522, 523, 524—*Filing agreement to refer to arbitration in Court—Reference to arbitration—"Decree"—to Appeal.*] The sharers of a joint undivided estate agreed in writing that such estate should be partitioned, and the accounts thereof settled by arbitration, and named one of such sharers as arbitrator, and agreed that he should settle all the accounts, show the surplus at each sharer's credit, and prepare lots, after partition of the lands and houses comprehended in such estate, and have them drawn within one year from the completion of the partition. Subsequently, one of such sharers applied, under s. 523 of Act X of 1877, to have such agreement filed in Court. The other sharer's not objecting to this course, such agreement was filed accordingly, and the case was referred to such arbitrator. The arbitrator made an award whereby he partitioned such estate into lots, assigning some only of such lots by name, and wherein he stated that he had not been able to settle the accounts owing to the default of the parties; and that, considering that the partition should take effect without any delay, he did not ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement," and he requested that the unassigned lots might be drawn in Court. The Court made an order confirming the award, and, it being objected that the settlement of the accounts should not be postponed, but that they should be settled as agreed, directed that the arbitrator should settle the accounts, and gave him a year's time

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for that purpose; and, some of the parties not being willing to draw the unassigned lots, directed the distribution of such lots "in reference to the age and number" of the sharers.

Held, that such order was a "decree" within the meaning of ss. 2 and 522 of Act X of 1877: that the arbitrator should himself have drawn such lots, or he should have made the parties draw them; but, inasmuch as it would not have strained the agreement to have had such lots drawn in the Court, and no objection had been taken to the arbitrator not having himself drawn them, it was not incumbent on the Court to have remitted the award in order that the arbitrator might have drawn them: that the Court, however, should not have distributed such lots in the manner it had done, but should have drawn a lot for each person; and in acting as it had done, it had acted contrary to the award, and for that reason its decree could not be maintained: and that, in confirming the award before the accounts had been settled and an award made in respect thereof, the Court had acted erroneously, inasmuch as the award had left undetermined a very important matter, *viz.*, the settlement of the accounts; and the Court should, under s. 520 of Act X of 1877, have remitted the award for the re-consideration of the arbitrator; and, as it had the power to remit it upon such terms as it thought fit, the Court could have allowed one year, if necessary, for the settlement of the accounts; and on this account, and also because the Court had made an order postponing the settlement of the accounts, and thereby made an order contrary to and in excess of the award, its decree must be reversed.

Sadik Ali Khan v. Imdad Ali Khan 236
ACTS—1877—X, ss. 2, 525, 526, 540—*Filing private award in Court—Order rejecting application—Appeal.*]—Per SPANKIE, J.—An order refusing an application to file a private award in Court is appealable as a decree. *Jokhun Rai v. Bucho Rai and Hussaini Bibi v. Mohsin Khan* impugned and distinguished: *Vishnu Bhau Joshi v. Ravji Bhau Joshi* distinguished.

Per STUART, C. J.—An order refusing an application to file a private award in Court, on grounds not mentioned in ss. 550 and 521, is a decree and appealable as such.

Janki Tewari v. Gayan Tewari 427
—ss. 2, 540, 556, 558.—*Dismissal of appeal for appellants default—Appeal.*] An order under s. 556 of Act X of 1877, dismissing an appeal for the appellant's default, is not a "decree" within the meaning of s. 2, and is not appealable.

Mukhi v. Fakir 382
—s. 13.—*Suit for arrears of rent—Determination of title—Res-judicata—Act XVIII of 1873 (N.-W.P. Rent Act), ss. 93, 95, 148.*] The question whether the parties to a suit in a Court of Revenue for arrears of rent stand in the relation of landlord and tenant is one which it is necessary for such Court to try incidentally for the purpose of disposing of such suit, but not one which such Court has special jurisdiction to determine, and its determination of that question is not that of a competent Court. Consequently, where a Court of Revenue determines in such a suit that the parties do not stand in such relation, such determination does not bar the party alleging that the parties do stand in such relation from suing in the Civil Court to establish such relation.

Gopal v. Uchabal 51
—s. 13—*Instalment-Bond—Hypothecation—Declaratory decree—Res-judicata.*] In 1864 the obligee of an instalment-bond, in which certain immovable property was hypothecated as collateral security for the payment of the instalments, brought a suit upon such bond "against Z and A (the obligors), and the property hypothecated in the bond, defendants," claiming to recover instalments which were due and unpaid, and a declaration of his right to recover instalments which were not due as they fell due. He obtained a decree in such suit for "the amount

claimed" against the "two defendants." It was also provided in such decree that, "until the satisfaction of the entire amount of the bond, the plaintiff can realize the amount of each instalment by executing this decree." The obligee applied in execution of such decree to recover, by the sale of such property, which had passed into the hands of third parties after the passing of such decree, instalments which had become due after the passing of such decree, and had not been paid. Such execution having been refused on the ground that such decree was a money-decree, the obligee brought a second suit upon such bond to recover such instalments by the enforcement of the lien therein created on such property.

Held that, although the enforcement of such lien was claimed in the former suit, yet, inasmuch as it was very questionable whether the Court was competent to grant the second relief claimed in that suit, *viz.*, a declaration of right to recover instalments which were not due in execution of a decree for instalments which were due, and the claim in the second suit was not the same as that in the former suit, the plaintiff asking for instalments said to be actually due, and not for a declaratory decree for instalments not due, the second suit was not barred by s. 13 of Act X of 1877.

Umrao Lal v. Behari Singh 297
 ACTS—1877—X, s. 13.—*Res-judicata*.] *I*, to whom the obligee of a bond for the payment of money in which immoveable property was hypothecated, had assigned by sale her right thereunder, sued in virtue of the deed of sale on such bond for the money due thereunder, claiming to recover by the sale of the hypothecated property. This suit was dismissed on the ground that the deed of sale, not being registered, could not be received in evidence, and consequently *I*'s right to sue on such bond failed. *I*, having procured the execution of a fresh deed of sale, and caused it to be registered, brought a second suit on such bond in virtue of such deed of sale, claiming as before. *Held* that the second suit was not barred by the provisions of s. 13 of Act X of 1877.

Ishri Dat v. Har Narain Lal 334
 —s. 13.—*Res-judicata*—"Same parties."]*G* sold an estate nominally to the minor son of *K*, but in reality to *K*. *K* brought a suit in his minor's son's name against *N*, the mortgagee of such estate, to redeem the same. *N* set up as a defence to such suit that such sale was invalid under Hindu Law, as such estate was a share of certain undivided property of which he was a co-sharer, and had been made without his consent. It was finally decided in that suit that such estate was a share of such undivided property, and not the separate property of *G*, and that such sale was invalid, having been made without the consent of *N*, a co-sharer of such invalid property. *G* subsequently redeemed such estate, and having done so, sold it a second time to *K*. *N* thereupon sued *K* to set aside such sale on the same ground as that on which he had defended the former suit. *Held* that the issue in such suit, whether such estate was a share of undivided property or the separate property of *G* was *res-judicata*, inasmuch as *K*, though not in name, yet in fact was a "party" to the former suit in which such issue was raised and finally decided.

Khub Chand v. Narain Singh 813
 —s. 13, Explanation II.—*Res-judicata*.] *S* and *B* jointly sued *N* for the redemption of a mortgage of an eight-anna share of a village, *B* suing as a purchaser from the mortgagor of a moiety of such share. *N* did not in defence of such suit assert a right of pre-emption in respect of such moiety, although such right had accrued to him on its sale by the mortgagor to *B*. *S* and *B* obtained a decree in such suit, and the mortgage was redeemed. *N* subsequently sued *B* and his vendor to enforce his right of pre-emption in respect of such moiety. *Held* that it was incumbent upon *N* in the former suit to have asserted in defence his

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right of pre-emption in respect of such moiety, inasmuch as if that right had been established, it must, so far as *B* was concerned, have proved fatal to his title to redeem, and that as he had not done so, the suit to enforce his right of pre-emption was barred by the provisions of s. 13 of Act X of 1877, *Explanation II*.

Narain Das v. Bhairo Bukhsipal 189
 ACTS—1877—X, ss. 13, 647—*Execution of decrees—Res judicata.*] *Held* by the Full Bench that the law of *res judicata* does not apply in proceedings in execution of decree.

Held, therefore, by the referring Bench, where on an application for the execution of a decree the question was raised whether the decree awarded mesne profits or not and the Court executing it determined that it did not award mesne profits, that such determination was not final, but such question was open to re-adjudication on a subsequent application for execution of the decree.

Rup Kuari v. Ram Kirpal Shukul 141
See Jurisdiction. Res judicata.

—ss. 28, 31.—*Insolvent—Assignment to trustees for benefit of creditors—Notice to creditors to register claims—Refusal of trustees to register claim preferred after time—Cause of action—Joinder of parties.*] The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the time notified by them, and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claims within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time; but it did not empower them to refuse to register claims made after that time but before distribution of the assets. *Held* that the trustees had been properly joined as defendants in such suit; that their refusal to register the plaintiff's claim gave him a cause of action against them; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it.

Adjuhia Nath v. Anant Das 799
 —s. 43—*Relinquishment of part of claim—Mesne profits.*]

The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June, 1879, the defendants had wrongfully taken such fruit. *Held* that, as the cause of action, i.e., the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne profits in the first suit, the second suit was barred by the provisions of s. 43 of Act X of 1877.

Debi Dial Singh v. Ajaib Singh 543
 —s. 43—*Omission to sue for one of several remedies—*

Mortgage.]—A mortgagee had two remedies in respect of the mortgagor's breach to pay the stipulated interest at the time fixed by the contract of mortgage, one being a suit on foreclosure proceedings to convert the mortgage into a sale, and the other a suit to recover his money against

his debtor by enforcement of his lien against the mortgaged property. He sued for the first remedy in respect of such breach, omitting the second. His suit was dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage term. He afterwards sued for the second remedy. *Held* that, inasmuch as the mortgagee was not at the time of his suing for the first remedy "a person entitled to more than one remedy," not being "entitled" to the first but only to the second, his omission at that time to sue for the second remedy was not under s. 43 of Act X of 1877 a bar to his afterwards suing for it.

Piari v. Khiali Ram 857
 ACTS—1877—X, s. 43. See Act I, of 1872, s. 91 717

—ss. 43, 44.—*Suit for recovery of Immoveable property—Mesne profits—Relinquishment of part of claim—Mortgage—Specific performance of contract—Compensation.*] According to the terms of a mortgage possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgagee had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne profits. The mortgagee subsequently sued the mortgagor to recover the mesne profits of the mortgaged property for those two years. *Held* that, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, *viz.*, the breach of the contract to give possession, the second suit was barred by the provisions of s. 43 of Act X of 1877.

Lalji Mal v. Hulasi 660
 —ss. 53, 588 (6).—*Amendment of plaint—Appeal.*] The plaintiff in a suit applied for the amendment of the plaint. The defendant objected to the amendment, and a day was fixed by the Court for the "admission or rejection of the petition of amendment and the determination of the defendant's objection thereto." The Court, after hearing the parties, made an order allowing the "petition of amendment," and rejecting the defendant's objections. The defendant appealed from such order to the High Court. *Held* that, inasmuch as orders amending plaints then and there are not made appealable by Act X. of 1877, and it was into this category, if into any at all, that such order must fall, such order was not appealable.

Rajindra Kishore Singh v. Radha Prasad Singh 854
 —ss. 57 (a), 562, 588.—*Return of plaint to be presented to proper Court—Remand by Appellate Court—Second appeal.*] The Court of first instance made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit. On appeal from such order the Appellate Court, holding that the Court of first instance was competent to try such suit, made an order "decreeing the appeal." It subsequently made an additional order directing that the case "should be returned for re-trial." On appeal to the High Court from such additional order, *held* that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which under the last clause of s. 588 of Act X of 1877 was final, and not an appeal from an order remanding a case under s. 562, the character of the original order of the Appellate Court not being altered by the passing of the additional order.

Kishna Ram v. Narsingh Sevak Singh 855

ACTS—1877—X, ss. 102, 103, 540.—*Adiournment—Non-appearance of plaintiff*] Nothing remained to be done in a suit except to hear arguments, for which a time had been appointed. Neither the plaintiff nor his pleader appeared at the appointed time. The Court consequently dismissed the suit. *Held* that its decree was appealable under s. 540 of Act X of 1877, and the lower appellate Court should have entertained the appeal, and disposed of it with reference to the provisions of s. 565, and ss. 102 and 103 were not applicable to the circumstances.

Rai Chand v. Mathura Prasad 292

—ss. 210, 253.—*Execution of decree against surety—Payment of decree by instalments.*] A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale, and applied for its postponement, producing a surety and a bond, in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against such surety.

Held that, inasmuch as the decree-holder had not been a party to the proceedings of the sale-officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of s. 210 of Act X of 1877 were not applicable, and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877.

Chandan Kuar v. Tirkha Ram 809

—s. 214. *See Pre-emption* 850

—ss. 237, 274, 276.—*Attachment of immoveable property—Material misdescription—Private alienation after attachment.*] Application was made for the attachment in execution of a decree of a muafi holding belonging to the judgment-debtor. The numbers and areas given in such application, as the numbers and areas of the lands comprised in such holding, were the numbers and areas of certain revenue-paying lands, and were not the numbers and areas of any lands held as muafi by the judgment-debtor. The order of attachment described the property as described in the application for attachment. The judgment-debtor having alienated by sale a muafi holding belonging to him, the decree-holders sued to have such alienation set aside as void under the provisions of s. 276 of Act X of 1877. *Held* that, having regard to the description given in the application for attachment and the order of attachment, it could not be said that the muafi holding alienated by the judgment-debtor was under attachment at the time of the alienation, and its alienation was therefore not void under s. 276 of Act X of 1877. *Held* also that the material misdescription of the property in this case in the order of attachment protected the alienees, who were *bona fide* purchasers, from having the alienation set aside as void under s. 276, as the attachment could not under the circumstances

be held to have been "duly intimated and made known" as required by that section.

Gumani v. Hardwar Pandey 698

ACTS—1877—X, ss. 244, 258.—*Questions for Court executing decree—Separate Suit—Adjustment of decree—Assignment of decree.*] *M*, who held a decree against *S* for possession of certain immoveable property and costs, assigned such decree to *S* by way of sale, agreeing to deliver the same to him on payment of the balance of the purchase-money. He subsequently applied for execution of the decree against *S*, claiming the costs which it awarded. *S* thereupon paid the amount of such costs into court, and, having obtained stay of execution, sued *M* for such decree, claiming by virtue of such assignment. The lower Court held that the suit was barred by the provisions of s. 244 of Act X of 1877, and also, treating such assignment as an uncertified adjustment of such decree, that it was barred by the terms of the last paragraph of s. 258 of that Act. *Held* that the suit was not barred by anything in either of those sections. The words "any Court" in the last paragraph of s. 258 refer to proceedings in execution and to the Court or Courts executing a decree.

Sita Ram v. Mahipal 533

—ss. 244, 258.—*Questions for Court executing decree—Separate Suit—Adjustment of Decree.*] *S*, alleging that a money-decree against him held by *G* had been adjusted out of court by a payment in cash and the delivery of certain property, and that *M* had notwithstanding such adjustment applied for execution of such decree and recovered the amount thereof, as the Court executing such decree had refused to determine whether it had been satisfied, on the ground that such adjustment had not been certified, sued *M* for the money which he had paid him out of court. *Held* that the suit was not barred by the provisions of s. 244 of Act X of 1877 or of s. 258 of that Act. The last paragraph of s. 258 means that the Court executing the decree shall not recognize an uncertified payment or adjustment out of court. It does not prohibit a suit for money paid to a decree-holder out of court, and the payment of which, not being certified, could not be recognised, and which the decree-holder had not returned, but had misappropriated by taking out execution of the decree a second time and securing the amount in full through the Court.

Shadi v. Ganga Sahai 538

—ss. 248, 311.—*Sale in execution—Notice of application for execution.*] The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the regularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution proceedings. *Ramesuri Dass v. Doorgadass Chatterjee* followed.

Held, therefore, where execution of a decree was applied for against the legal representative of deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877, was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission.

Quære.—Whether such omission was an irregularity in "publishing or conducting" the sale, within the meaning of s. 311 of that Act.

Imam-un-nissa Bibi v. Liakat Husain. 424

—ss. 266, 268.—*Attachment of property—Debt—Vendor and purchaser.*] The right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long

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as the conveyance has not been executed, a debt but a merely possible right or interest, and, as such, under s. 286 of Act X of 1877, is not liable to attachment and sale in the execution of a decree. The person who purchases such right or interest at a sale in the execution of a decree takes nothing by his purchase.

Ahmed-ud-din Khan v. Majlis Rai

12

ACTS—1877—X, ss. 279, 283,—*Attachment of property—Suit to establish right—Suit for compensation for Wrongful attachment.*] An order striking off an objection to the attachment of property attached in execution of a decree, for default of prosecution is not "conclusive" as regards the right which the objector claimed to the property, within the meaning of s. 283 of Act X of 1877.

Held, therefore, where a person objected to the attachment of certain moveable property attached in execution of a decree, claiming it as his own, and his objection was struck off for default of prosecution, that such person might sue for damages for the wrongful attachment of such property without suing to establish the right which he claimed thereto.

Kallu Mal v. Brown

604

—ss. 285, 311, 212—*Sale in Execution of Decrees of several Courts.*] Certain immovable property was attached in execution of a decree made by a Subordinate Judge and also in execution of a decree made by a Munsif. These decrees were held by the same person and the judgment-debtor was the same person. Such property was sold in execution of both decrees. On the application of the judgment-debtor, who brought into court the amount due on the decree made by the Subordinate Judge, and with the consent of the decree-holder and the auction-purchaser, the Subordinate Judge made an illegal order setting aside such sale. Subsequently, on the application of the decree-holder and the auction-purchaser, the Munsif made an order confirming such sale.

Per SPANKIE, J.—That the Subordinate Judge had not any jurisdiction under s. 285 of the Civil Procedure Code to deal with such sale as regards the decree made by the Munsif, and the Munsif was not precluded by that section from confirming such sale as regards the decree made by him by reason that the Subordinate Judge, a Court of a higher grade, had made an order setting it aside.

Per OLDFIELD, J.—That, having regard to the provisions of that section, it was doubtful whether the Munsif was competent to confirm such sale; but inasmuch as the Subordinate Judge only intended to set it aside as regards the decree made by him, and his order was illegal, and the Munsif's order had done substantial justice, there was no reason to interfere.

Chunni Lal v. Debî Prasad

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—ss. 287, 316. *See Sale in execution of decree* 647

—s. 295.—*Sale in execution of decrees—Separate sales in execution of decrees.*] Application was made for execution of a decree for money against *B* and also for execution of a decree for money against *B* and another person jointly and severally. Certain immovable property belonging to *B* was sold in execution of the first decree, the assets which were realized by such sale being sufficient to satisfy the amounts of both decrees. Such property was then sold a second time in execution of the second decree. *Held*, under these circumstances, that the second sale should be set aside, not being allowable with reference to the provisions of s. 295 of Act X of 1877.

Rati Ram v. Chiranji Lal

679

—s. 205.—*Sale in execution of Small Cause Court decree—Rateable division of sale-proceeds—Holder of decree made by Judge of Small Cause Court in the exercise of the powers of a Subordinate Judge.*] The Judge of a Court of Small Causes sitting in the exercise of his

powers as a Subordinate Judge is not one and the same Court, but two different courts.

Held, therefore, that the holder of a decree made by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably, under s. 295 of Act X of 1877, assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court.

Himalaya Bank v. Hurst. 710
ACTS—1877—X, s. 310.—*Sale in execution of decree—Pre-emption.*] The provisions of s. 310 of Act X of 1877, are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights and interests of a mortgage in such a share.

Jairam Das v. Beni Prasad 15
 —s. 310—*Sale in execution of decree of share of undivided estate—Confirmation of sale in favour of co-sharer—Appeal by auction-purchaser.*] A share of undivided immoveable property was put up for sale in execution of a decree, and was knocked down to *M*. Before it was knocked down to him *A*, the decree-holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to *M*, claiming the right of pre-emption. The Court executing such decree subsequently made an order confirming the sale of such share in favour of *A*. *M* appealed, impugning the propriety of the confirmation of the sale in favour of *A*. *Held*, that such appeal would not lie.

Munir-ud-din Khan v. Abdul Rahim Khan 674
 —s. 310—*Pre-emption.*] The requirements of s. 310 of Act X of 1877 are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder. That section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. *Tej Singh v. Gobind Singh* followed.

Hira v. Unas Ali Khan 827
 —s. 311.—*Sale in execution—Holiday—Irregularity in publication or conduct of sale.*] The sale of immoveable property by an amin on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.

Bisram Mahton v. Sahib-un-nissa 333
 —See Act XV of 1877, s. 13, schedule ii, No. 166 185
 —ss. 311, 312, 588.—*Suit to have an execution-sale, which had been set aside, confirmed—Finality of order setting aside sale.*] *Held*, (OLDFIELD, J., dissenting) that a suit by the purchaser at a sale of immoveable property in execution of a decree, which has been set aside under ss. 311 and 312 of Act X of 1877, to have such sale confirmed, on the ground that there was no irregularity in the publication or conduct thereof, is not barred by the last clause of s. 312 or by the last clause of s. 588, but is maintainable.

Azim-ud-din v. Baldeo 554
 —ss. 311, 626, 629.—*Application to set aside sale—Review of judgment—Order setting aside sale—Appeal.*] An application under s. 311 of Act X of 1877, to set aside a sale in execution of a decree having been made by the judgment-debtor, the Court executing the decree (Subordinate Judge) disallowed the objections, and passed an order confirming such sale. The judgment-debtor subsequently applied to the Subordinate Judge for a review of judgment. The Subordinate Judge, without recording his reasons for granting such application, and without recording an order granting such application, irregularly proceeded at once

to pass an order setting aside such sale, without cancelling the previous order confirming it. The auction-purchaser appealed to the District Judge. That officer, treating the appeal as one from an order granting an application for review of judgment, entertained it, and set aside the Subordinate Judge's second order. *Held* that the District Judge was not justified in entertaining such appeal, such order not being one granting an application for review, but one setting aside a sale, and as such not appealable.

Before a review of judgement is granted an order granting the application for review and the reasons for granting the same should be recorded.

Bhairon Din Singh v. Ram Sahai 316
 ACTS—1877—X, s. 313.—*Sale in execution.*] A person who purchases immovable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable therein, is not entitled to the benefit of the provisions of s. 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchase valueless property.

Mahabir Prashad v. Dhuman Das 527

—s. 351—*Insolvent Judgment-debtor*—“*Unfair preference.*”]
J, in pursuance of a previous agreement with *B*, and on being pressed by *B*, who had a pecuniary claim against him, which nearly equalled half the amount of all the pecuniary claims against him, assigned to *B* the whole of his property by way of sale, in consideration in part of *B*'s pecuniary claim against him. *Held* that by such assignment *J* did not give *B* an “undue preference” to his other creditors, within the meaning of s. 351 of Act X. of 1877.

Joakim v. The Secretary of State for India 530

—ss. 365, 366.—*Sale in execution of decree—Death of decree-holder before sale—Effect on validity of sale.*] A judgment-debtor applied that an execution-sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside, and disallowed such application, and made an order confirming such sale.

Held per PEARSON, J., that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside.

Per SPANKIS, J., that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 365 and 366 of Act X of 1877, as the Court executing the decree should have proceeded under those sections.

Per OLDFIELD, J., and STRAIGHT J., that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 365 and 366 of Act X of 1877 could not be adapted to execution-proceedings. As such sale had been published and conducted according to law, it had properly been confirmed.

Dulari v. Mohan Singh 759

—s. 366. See ss. 2, 366, 588 (18) 844

—s. 373—*Withdrawal of suit—Plea taken for the first time at the hearing of second appeal.*] The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged at the hearing of the second appeal.

Quere—Whether under s. 373 of Act X of 1877 the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with.

Zahur-un-nissa v. Khuda Yar Khan 528
 ACTS—1877—X, s. 424. *See* ss. 2, 424 20

—ss. 520, 521—*Arbitration—Remission of award—Refusal of arbitrators to reconsider it—Appeal impugning propriety of order of remission—Mosque—Right to sue—Worshipper.*] An award was remitted under s. 520 of Act X of 1877. The arbitrators refused to consider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under s. 520. *Held*, that the question whether the award had been properly remitted under s. 520 or not could be entertained in such appeal.

The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers in entering or leaving such mosque.

Abdul Rohman v. Yar Muhammad 636

—ss. 520 (a) 525, 526—*Filing private award in Court—Amendment of plaint taking case out of scope of Ch. 37 of Act X of 1877—Appeal.*] By the amendment of the plaint, a case under s. 525 of Act X of 1877, was taken out of the scope of Chapter XXXVII of that Act. *Held* that, this being so, the decree of the Court of first instance was appealable.

Held also, where a private award determined a matter not referred to arbitration, that a claim under s. 525 of Act X of 1877 that such award should be filed in Court was properly dismissed.

Juala Singh v. Narain Das 541

—ss. 522, 523, 524. *See* ss. 2, 522, 523, 524 286

—ss. 525, 526. *See* ss. 2, 525, 526, 540 427

—s. 540—*Appeal.*] The plaintiffs, the widow and son, respectively, of *N*, deceased, claimed immoveable property inherited from his father by *N*, and also immoveable property which had devolved upon *N* from his brother, who had predeceased him, and mesne profits of such properties. The Court of first instance, finding that the claim to the former property was admitted and that to the latter was not denied, but resisted as barred by s. 13 of Act X of 1877, and holding it not to be so barred, made a decree returning the plaint to the plaintiffs that they might after correcting it file it either in the Revenue Court in regard to the profits of the former property, or in the Civil Court for possession of the latter property. *Held* that, although the claim of the plaintiffs was not either decreed or dismissed, yet as the right and title asserted by them to such properties was implicitly recognized by such decree, the defendants were entitled to appeal from it.

Behary Bhagat v. Begam Bibi 75

—ss. 540, 588 (6).—*Return by Appellate Court of plaint for amendment or presentation to proper Court—Appeal from order—Second Appeal to High Court.*] The lower appellate Court (Subordinate Judge) decided on appeal by the defendant from the decree of the Court of instance (Munsif) that the Court of first instance had no jurisdiction to entertain the suit, as the value of the subject matter of the suit exceeded the pecuniary limits of its jurisdiction; and ordered that the "appellant's appeal be decreed, the decision of the Munsif be reversed, and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court." The plaintiff appealed to the High Court from such order as an order returning a plaint to be presented to the proper Court.

Held that such order could not be regarded as one to which art. (6) of s. 588 of Act X of 1877 was applicable. That relates to orders returning plaints for amendment or to be presented to the proper Court passed by a Court of first instance, and not to an order by an appellate Court upon an appeal to it from the decree of a Court of first instance on general grounds. The plaintiff's proper course was to have preferred a second appeal.

Bindeshri Chaubey v. Nandu 456
 ACTS—1877—X, ss. 540, 556, 558. *See* ss. 2, 540, 556, 558 382

ss. 540, 556, 558—*Dismissal of Appeal on the merits in the absence of appellant—Second Appeal.*] An appellate Court, the appellant not attending in person or by his pleader, instead of dismissing the appeal for default, as provided by s. 556 of Act X of 1877, proceeded, in contravention of the provisions of that law, to dispose of the appeal on the merits, and dismissed it. The appellant preferred a second appeal to the High Court, contending that the appellate Court had acted contrary to law. *Held* that the appellate Court had so acted, and its decision could only be treated as a dismissal for default, and that, so treating it, the proper and only course open to the appellant was to have applied under s. 558 for the re-admission of his appeal, and under these circumstances the second appeal would not lie. *Nand Ram v. Muhammad Baksh* followed.

Kanahi Lal v. Naubat Rai 519

s. 562.—*Extent of appeal from order of remand.*] An appeal from an order on appeal remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of s. 562 of Act X of 1877 or not, but the question whether the decision of the appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.

Badam v. Imrat 675

s. 562.—*Disposal of suit on preliminary point—Reversal by Appellate Court of decree on such point and irregular remand of case under s. 562 for trial of a certain issue—Power of succeeding Judge of Appellate Court to re-try such point.*] A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court the then Judge of the appellate Court, Mr. B, reversed the decree upon such preliminary point and remanded the suit under s. 562 of Act X of 1877 for the trial of a certain issue. The Court of first instance tried such issue and made a decree in accordance with its finding thereon. On appeal against the decree of the Court of first instance the defendant again raised such preliminary point. The then Judge of the appellate Court, Mr. K, dismissed the suit upon such preliminary point. *Held* that, as, although Mr. B, had irregularly remanded the suit under s. 562 of Act X of 1877, his decision disposed of such preliminary point and only left open for trial the issue which he had directed to be tried Mr. K, was not competent to re-try and decide such preliminary point.

Suraj Din v. Chatter 755

s. 566.—*Finding in favour of respondent who had not appealed or objected under s. 561—Right of respondent to benefit by such finding.*] H sued B for arrears of rent, alleging that the annual rent payable by the latter was Rs. 212-1-0. The Court of first instance gave H a decree based on the finding that the annual rent payable by B was Rs. 94. H appealed and the lower appellate Court gave him a decree based on the finding that the annual rent payable by B was Rs. 128-12-0. B appealed to the High Court from the lower appellate Court's decree. H did not appeal from that decree, neither did he take any objections thereto under s. 561 of Act X of 1877, STUART, C. J., and OLDFIELD, J., before whom such appeal came for hearing, remanded the

case to the lower appellate Court for a fresh determination of the question as to the amount of annual rent payable by *B*. The lower appellate Court then found that the annual rent payable by *B* was Rs. 212-1-0.

Held by STUART C. J., (OLDFIELD, J., dissenting) that such second finding of the lower appellate Court should be accepted and the amount awarded by its decree be enlarged accordingly, notwithstanding *H* had not appealed from that decree or preferred objections thereto.

Bikramjit Singh v. Husaini Begam . 648

ACTS—1877—X, Chapters *XLI, XLII*, and s. 577—*Appeal—Res judicata.*] *M* sued and *K* and *J* to enforce a right of pre-emption in respect of property which he alleged *K* had sold to *J*. *K* denied that she had sold such property to *J*. *J* set up as a defence that *M* had waived his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. *J* then appealed to the High Court, making *K* the respondent. *Held* that neither the appeal from the original decree in the suit nor the appeal from the appellate decree therein was admissible.

Held also that the finding as to the alleged sale was one between the plaintiff and the defendants in the suit and not between the defendant-vendor and the defendant-vendee, who were not litigating, and would not bar adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the sale.

Junna Singh v. Kamar-un-nisa . 152

s. 578.—*Right to begin—Burden of proof—Irregularity not affecting merits—Powers of appellate Court.*] The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance, instead of calling on the defendants to establish the fact that they had not received the consideration for the bond as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower appellate Court held that the defendants should have been required to begin under the circumstances, and reversed the decree of the Court of first instance, and gave the plaintiff a decree.

Held that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at such some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisions of s. 578 of Act X of 1877, whether it was competent for the lower appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower appellate Court should have not ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it.

Makund v. Bahori Lal . 824

ss. 584, 586, 588 (28), 589.—*Order of remand—Appeal—suit of the nature cognizable in Small Cause Court—Second appeal.*] An order on appeal from a decree in an original suit of the nature cognizable in Mufassal Courts of Small Causes, under s. 562 of Act X of 1877, remanding the suit for re-trial is appealable, s. 586 of

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Act X of 1877 notwithstanding, as that section applies to appeals from appellate decrees and not to appeals from orders.

The Collector of Bijnor, Manager of the estate of Chaudhri Ranjit Singh, a minor, *v.* Jafar Ali Khan 18

ACTS—1877—X., s. 586.—*Suit of the nature cognizable in a Small Cause Court—Second appeal—Sale-proceeds.*] A suit by one decree-holder against another for the money received by the latter on a division between them of the proceeds of an execution-sale as his share of such proceeds, under the order of the Court executing the decrees, is a suit of the nature cognizable in a Court of Small Causes, and consequently, where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit.

Mata Prasad *v.* Gauri 59

See Jurisdiction 37, 66

ss. 595, 596.—*Appeal to Her Majesty in Council—*

Final order passed on appeal by the High Court on a question mentioned in s. 244 of Act X of 1877 (Civil Procedure Code).] An order passed on appeal by the High Court determining a question mentioned in s. 244 of Act X of 1877 is a final "decree" within the meaning of s. 595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the Lower Courts, that notwithstanding the value of the subject matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council.

Ram Kirpal Shukul *v.* Rup Kuar 639

s. 622. See High Court, powers of revision.

s. 647. See ss. 13, 647 141

XV.—*Registered bond payable on demand—Limitation—Act XIV of 1859 (Limitation Act)—Act IX of 1871, (Limitation Act.)*] The cause of action in a suit on a registered bond bearing date the 2nd March 1870, was alleged to have arisen on the 5th January 1879, the date of demand. Under Act XIV of 1859 the limitation for such a suit was six years computed from the date of the bond. Before that period expired Act IX of 1871 came into force, which provided a limitation for such a suit of three years computed from the date of demand. *Held* that, as the cause of action and the institution of such suit occurred after the repeal of Act IX of 1871, the provisions of that Act were not applicable, and, accordingly, whether Act XIV of 1859 or Act XV of 1877 governed such suit, it was barred, as in either case limitation began to run from the date of such bond.

Bansi Dhar *v.* Hari Sahai 340

s. 2.—*Bond payable on demand—Limitation Act IX of 1871 (Limitation Act.)*]—Act XV of 1877, by making the period of limitation for a suit on a bond payable on demand computable from the date of its execution, has shortened the period of limitation prescribed for such a suit by Act IX of 1871 under which the period was computable from the date of demand. *Held*, therefore, that, under the provisions of s. 2 of Act XV of 1877, a suit on such a bond executed on the 14th December 1869, having been brought within two years from the date that Act came into force, was within time.

Rup Kishore *v.* Mohni 415

s. 2, sch. ii, No. 64.—*Suit on accounts stated—Act IX of 1871 (Limitation Act), sch. ii, art. 62.*] The accounts in a suit on accounts stated were stated when Act IX of 1871 was in force and were not signed by the defendant or an authorized agent on his behalf. Had that Act been in force when the suit was instituted the suit would have been within time under art. 62 of schedule ii of that Act. The suit was brought, however, after the passing of Act XV of 1877, and by

reason of the accounts not being signed did not come within the scope of art. 64 of schedule ii of that Act. *Held* that the words in s. 2 of Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871" did not save the plaintiff's right to sue on the accounts stated, a right to sue not being meant by or included in the term "title acquired," that term denoting a title to property and being used in contradistinction to a right to sue; that the last clause of that section was not applicable, because Act XV of 1877 did not prescribe a shorter period of limitation than that prescribed by Act IX of 1871, but attached a new condition to the suit, *viz.*, that the accounts must be signed by the defendant or his agent duly authorized in that behalf; and that the suit was in consequence barred by limitation.

Zulfikar Husain v. Munna Lal

ACTS—1877—XV, s. 13, sch. ii, art. 186—*Application to set aside sale in execution of decree—Absence of judgment-debtor from British India—Limitation Act X of 1877 (Civil Procedure Code), s. 311.* The provisions of s. 13 of Act XV of 1877 are not applicable to proceedings in the execution of a decree.

Ashan Khan v. Ganga Ram

s. 18 and sch. ii, arts. 62, 120—*Suit for money received by the defendant for the plaintiff's use—Fraud.* The plaintiff claimed, as an heir to *N*, deceased, a moiety of moneys which at the time of *N*'s death were deposited with a banker and which the defendant, the other heir to *N*, had received from such banker. *Held* that the suit was one for money received by the defendant for the plaintiff's use, to which the limitation provided in art. 63 sch. ii of Act XV of 1877 applied, and not one to which the limitation provided in art. 120 applied.

Kundun Lal v. Bansi Dhar

s. 19.—*Execution of decree—Acknowledgment in writing.* An application for the execution of a decree is an application in respect of a "right," that is to say, the "right" of the decree-holder to execution, within the meaning of s. 19 of Act XV of 1877. An application in writing by a judgment-debtor for the postponement of a sale in the execution of the decree and the issue of fresh notifications of sale is "an acknowledgement of liability" within the meaning of the same section, in respect of such "right." Such an acknowledgement, when the application is signed by the pleader expressly authorized to make it, is "signed" by an "agent duly authorized in the judgment-debtor's behalf," within the meaning of the same section.

Ramhit Rai v. Satgur Rai

s. 19 and sch. ii, Nos. 57, 85—*Acknowledgment of debt contained in unregistered document—Admissibility of document as evidence of acknowledgment.* The nature of the pecuniary transactions between *B* and *G* were such that sometimes a balance was due to the one and sometimes to the other. On the 1st October 1875, there was a balance due to *B*. During the ensuing year, as computed in the account, *G* made payments to *B* exceeding such balance. On the 19th November 1876, a balance of Rs. 3,500 was found to be due from *G* to *B*. On the 11th December 1876, *G* executed a conveyance of certain land to *B*, for which such debt was partly the consideration. In such conveyance *G* acknowledged his liability in respect of such debt. He died before such conveyance was registered, and it did not operate. On the 18th November 1879, *B* sued *G*'s widow for such debt. *Held* that such conveyance was admissible as evidence of the acknowledgment by *G* of his liability for such debt, notwithstanding such conveyance was not registered; that, applying No. 85, sch. ii of Act XV of 1867, such debt was not barred by limitation when such acknowledgment was made; and that, if that article was not applicable, but the period of limitation began to run

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from the time each item composing such debt became a debt, still such debt would not have been barred when such acknowledgement was made, as the debt with which the year computed from the 1st October 1875, opened was extinguished by payments made by G in the course of that year.

Khushalo v. Behari Lal	523
ACTS—1877—XV, s. 28.— <i>Trees</i> —“Land”—Act I of 1868 (<i>General Clauses Act</i>), s. 2 (5)— <i>Title</i> —Act IX of 1871 (<i>Limitation Act</i> , s. 29.) Trees growing upon land are “land,” within the meaning of s. 29, Act IX of 1871.	

Possession of land by a wrong-doer for twelve years not only extinguishes the title of the rightful owner of such land, but confers a good title on the wrong-doer.

Jagrani Bibi v. Ganeshi	435
sch. ii, No. 10. See Pre-emption	175
No. 45. See Hindu Law	738

Nos. 59, 60, 63.—*Suit for interest*—*Suit for money payable on demand*—*Suit for money deposited payable on demand.*] The plaintiff in this suit deposited certain money with the defendants, a firm of bankers, on the 30th August 1863. On the 2nd January 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit, and interest on the same calculated at six per cent. per annum. On the 11th February 1876, the defendants having proposed to pay the plaintiff such balance, together with interest on the original deposit, from the 2nd January 1867, to the 15th February, 1876, calculated at four per cent. per annum, the plaintiff demanded that she should be paid such interest at the rate of six per cent. per annum. The defendants refused to accede to this demand on the 14th February 1876, and on the 17th of the same month they paid the plaintiff such balance with such interest calculated at the rate they proposed, viz., four per cent. On the 11th February 1879, the plaintiff brought the present suit against the defendants in which she claimed the sum representing the difference between such interest calculated at four per cent. and six per cent.; alleging that her cause of action arose on the 14th February 1876. Held that the defendants were estopped from questioning the plaintiff's demand for such interest calculated at six per cent. Held also that the suit could not be regarded as either one for money deposited under an agreement that it should be payable on demand, but must be regarded as one for a balance of money payable for interest for money due, to which cl. ix, s. 1 of Act XIV of 1869, No. 61, sch. ii of Act IX of 1871, and No. 63, sch. ii of Act XV of 1877, had successively applied, and the suit was barred by limitation.

Makundi Kuar v. Balkishen Das	328
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No. 65.—*Vendor and Purchaser*—*Agreement by purchaser to refund purchase-money in case land sold proved deficient in quantity*—*Suit for refund*—*Suit for compensation for breach of contract.*] The vendor of certain land agreed in the conveyance, which was registered, that, in case the land actually conveyed proved to be less than that purporting to be conveyed, he should make a refund to the purchaser of the purchase-money, in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. Held by SPANKIE, J., that the suit was one of the nature described in No. 65, sch. ii of Act XV of 1877, to which, the agreement being in writing registered, the limitation provided by No. 116, sch. ii of that Act was applicable.

Held by OLDFIELD, J., that No. 116, sch. ii of Act XV of 1877, was applicable to the suit.

Kishen Lal v. Kinlock

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ACTS—1877—X. sch. ii, Nos. 61, 116—*Registered bond for the payment of money—Suit for compensation for the Breach of a Contract in writing registered.*] The defendant having borrowed money from the plaintiff, gave him a bond, dated the 4th July 1872, for the payment of such money, with interest, within two years, or on certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money; that it was payable on the 4th July 1874; that on that day he had demanded payment; that the cause of action arose on that day, as the defendant did not pay; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of No. 66 of sch. ii of Act XV of 1877, but one to which No. 116 of that schedule was applicable, and it might proceed on the plaint without any amendment thereof.

Gauri Shankar v. Surju

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No. 91—*Suit to cancell Instrument.*] *K*, to whom *B* had given a usufructuary mortgage of certain land, promising to put him in possession, sued *B* for the mortgage-money, *B* having failed to put him in possession. This suit was instituted on the 22nd November 1875. On the 25th of the same month *K*, learning that *B* was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on *B* on the 29th November. On the 1st December 1875 *B* transferred certain land to *T* by way of sale. *K*'s suit was dismissed by the lower Courts, but the High Court, on the 7th August 1876, gave him a decree. Certain property belonging to *B* was sold in execution of this decree, but the sale-proceeds were not sufficient to satisfy the amount due on the decree. *K*, thereupon, on the 1st July 1879, sued *T* to cancel the conveyance to him by *B* on the ground that it was fraudulent and without consideration. *Held* that the words in 91, sch. ii, Act XV of 1877, "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit," and consequently the period of limitation for *K*'s suit began to run, not merely when he had knowledge of the fraudulent character of the conveyance to *T*, but when, having such knowledge, it had become apparent to him that there was no other property than that conveyed to *T* available for the realization of the unsatisfied balance of his decree, and the suit was within time.

Tawanger Ali v. Kura Mal

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Nos. 91, 114—*Suit to cancel instrument—Suit for the rescission of a contract—Time from which limitation runs—Equitable estoppel.*] *B*, *P*, and *G* sued to cancel a lease of certain land on the ground that the lessor was not competent to grant the same, the defendants being the lessor and the lessee. The lessee's defence to the suit was that the lease had been executed with *B*'s knowledge, who caused it to be attested and registered; that it was recognized and adopted by *P* and *G*, who allowed the lessee to take possession of such land and accepted rent from him in respect thereof; that under these circumstances the plaintiffs were estopped from denying the lessor's competency to grant the lease; and that the suit was barred by limitation, as more than three years had elapsed from the date of the lease. The lower appellate Court affirmed the decree of the Court of first instance in the favour of the plaintiffs on the ground that the lessee was aware that the lessor was not com-

petent to grant the lease. *Held*, on second appeal by the lessee, that the limitation applicable to the suit was to be found in No. 91, sch. ii, of Act XV of 1877, and not No. 114, that last article referring to the rescission of contracts as between promissors and promisees, and not to suits by third parties to have an instrument cancelled or set aside; and that, as regards *B*, inasmuch as the existence of the lease became known to him at the time of its execution, and three years from that time had expired, the suit was barred by limitation.

The proper issues as between *P* and *G* and the lessee framed and remitted for trial.

Bhawani Prasad Singh v. Bisheshwar Prasad Misr 846
ACTS—1877—XV, sch. ii, Nos. 115, 120.—*Re-marriage of Hindu widow—Custom—Breach of contract.*] The plaintiff sued the defendant, who had married the plaintiff's deceased brother's widow, to recover, by way of compensation, the money expended by his deceased brother's family on his marriage, founding his claim upon a custom prevailing among the Jats of Ajmere, whereby a member of that community marrying a widow was bound to recoup the expenses incurred by her deceased husband's family on his marriage. *Held* that the suit was one of the character described in No. 115, sch. ii. of Act XV of 1877, and not in No. 120 of that schedule, and the period of limitation was therefore three and not six years.

Madda v. Sheo Bakhsh 385
No. 116.—*Registered bond.*] *Held* that No. 116, sch. ii of Act XV of 1877, is applicable to a suit on a registered bond for the payment of money.

Husain Ali Khan v. Hafiz Ali Khan 600.
No. 144.—*Suit for possession of immoveable property—Adverse possession.*] I died in 1861, leaving a zamindari estate, a moiety of which at the time of his death was in the possession of a mortgagee. On the death of I, the defendants in this suit, who were among his heirs, caused their names to be recorded, as his heirs, as the proprietors of such estate, to the exclusion of the plaintiff in this suit, who was his remaining heir; and they appropriated to their own use continuously for more than twelve years the profits of the unmortgaged moiety of such estate, and the *malikana* paid by the mortgagee of the mortgaged property. In 1877 the defendants redeemed the mortgage of the mortgaged moiety of such estate from their own moneys. In 1878 the plaintiff sued for the possession of her share by inheritance of such estate. *Held* (SPANKIE, J, doubting), with reference to the mortgaged moiety of such estate, that the possession of the defendants in respect of such moiety did not become adverse, within the meaning of art. 144 of sch. ii of Act XV of 1877 on the death of I in 1861, but on the redemption of such moiety in 1877, "adverse possession" under that article meaning the same sort of possession as is claimed, that is to say, in this case, full proprietary possession, which was not the nature of the possession of the defendants until the redemption of the mortgage, and the suit therefore, in respect of such moiety, was within time.

Umr-un-nissa v. Muhammad Yar Khan 24
No. 179.—*Execution of decree—Application to keep in force decree—Step in aid of execution—Act IX of 1871 (Limitation Act), sch. ii, No. 167.*] An application by a judgment-debtor stating that the proceedings in execution had been adjusted, and he had paid the decree-holder Rs. 10, and would pay him the balance of the decretal amount subsequently, and praying that the execution case might be struck off, is an application to "keep in force the decree," within the meaning of No. 167, sch. ii of Act IX of 1871 and "step in aid of execution of the decree," within the meaning of No. 179 sch. ii of Act XV of 1877.

Ghansham v. Mukha 320

ACTS—1877—XV, sch. ii No. 179.—*Application for execution of decree—Step in aid of execution.*] *G* sued *K*, as the legal representative of her deceased husband *S*, on a bond executed by *S* in his favour, and obtained a decree. Subsequently he sued *K* on a bond which she had personally executed in his favour, and obtained a decree. On the 7th September 1876, he applied for execution of both these decrees, and *S*'s landed estate, which stood recorded in *K*'s name, was attached. This estate was sold on the 20th February 1887, being put up for sale in one lot, in satisfaction of both decrees, in accordance with an application made by *G* on the 16th February, and was purchased by *G* for the amount of the decrees. This sale was subsequently confirmed, and on the 10th December 1877, satisfaction of the decrees was entered up, and the execution proceedings struck off the file. Subsequently three of the heirs of *S* in one case, and two in another, instituted suits against *G* claiming to recover from such portion of the proceeds of the sale of *S*'s property as had been appropriated to the discharge of *G*'s decree against *M*, and such heirs obtained decrees for certain sums, which *G* was obliged to pay. *G* thereupon, on the 16th May 1879, applied for execution of his decree against *M*. Held that such application was not one in continuation of that made on the 7th September 1876, but was a fresh application, and the application made by *G* on the 16th February 1877, was not one for a step in aid of execution, within the meaning of No. 179, sch. ii, of Act XV of 1877, from which limitation could be computed and the application of the 16th May 1879, was barred by limitation. *Babu Pyaroo Tahobildarinee v. Syud Nazir Hossein; Paras Ram v. Gardner; and Issuree Dassoo v. Abdool Khalak* distinguished by **STRAIGHT, J.**

Khair-un-niss v. Gauri Shankar

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ACTS—1877—XV, No. 179.—*Application for execution of decree—Legal representatives of deceased judgment-debtor.*] An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor takes effect, for the purposes of limitation against them all.

Ram Anuj Sewak Sing v. Hingu Lal

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No. 179.—*Execution of decree—Limitation—Application of decree-holder for postponment of sale—Application to take some step in aid of execution of decree.*] An application by a decree-holder for the postponment of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time is not "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of No. 179, sch. ii, Act XV of 1877, and limitation cannot be computed from the date of such an application.

Mainath Kuari v. Debi Bakhah Rai

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1879—I, sch. ii, No. 12 (b).—*Security-bond for due accounting for "property" received by virtue of office.*] The question was whether a bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by him of public moneys, deposits, notes, stamp-paper, postage labels, or other property of Government committed to his charge was or was not exempted from stamp-duty by the provisions of art 12 (b) of sch. ii of Act I of 1879, regard being had to the words "other property."

Per STUART, C. J., that such bond was one to secure the "due execution of an office" and the "due accounting for money received by virtue thereof," and nothing more, as the words "or other property" must be taken to mean property of the same kind as previously mentioned, and therefore "money" or the like of money, and such bond was therefore exempted from stamp-duty by the provisions of art. 12 (b) of sch. ii of Act I of 1879.

Per OLDFIELD, J., that, inasmuch as the words in art. 12 (b) of sch. ii of Act I of 1879 "or the due accounting for money received by virtue

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thereof" should be regarded as mere surplusage, and the "due execution of an office" and the "due accounting for money received by virtue thereof" be considered one and the same thing, and as the due accounting for property received by him by virtue of his office was the "due execution of his office" by the officer in this case, such bond was one for the "due execution of an office" and was therefore exempted from stamp duty.

Per SPANKIE, J., and STRAIGHT, J., that, inasmuch as the words in art. 12(b) of sch. ii of Act I of 1879 could not be regarded as mere surplusage, and there was a distinction drawn by the Legislature between the "due execution of an office" and the "due accounting for money received by virtue thereof," such bond was not one for the "due execution of an office," and being one for the due accounting for "property" it was not one for the due accounting for "money," and therefore it was not exempted from stamp-duty.

Reference by Board of Revenue, N.-W. P.	788
ACTS —1879—VIII, s. 11, 12. See Jurisdiction	144
—1880—III, s. 14—"Soldier—Sub-conductor—Sale of spirituous liquor." A Sub-Conductor in the Commissariat Department is not a "soldier" within the meaning of s. 14 of Act III of 1880; and consequently the sale of spirituous liquor to the wife of such a person without the license required by that section is not an offence against that section.	
Empress of India v. Dosabhooy Framji	214
ADJOURNMENT. See Act X of 1877, ss. 102, 103, 540	292
ADJUSTMENT. See Act X of 1877, ss. 244, 258	533, 538
ADVERSE POSSESSION. See Act XV of 1877, sch. ii, art. 144	24
AGREEMENT. See Act XVIII of 1869, ss. 3 (5), (25), and sch. ii, No. 11	260
See Act XV of 1877, sch. ii. No. 65	712
See Mortgage	706
See Act IX of 1872, s. 2(a) and s. 25 (2)	221 787
See Act IX of 1872, s. 25 (3)	781
ALIENATION. See Hindu Law	
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AMENDMENT OF PLAINT. See Act X of 1877, ss. 53, 588 (6)	854
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APPEAL. See Act XXVII of 1860, ss. 5, 6	304
Act XVIII of 1873, ss. 143, 189	63
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APPLICATION FOR EXECUTION OF DECREE. See Act XV of 1877, sch. ii, No. 179	
ARBITRATION. See Act X of 1877	
ASSIGNMENT OF DECREE. See Act X of 1877, ss. 244, 258	533
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See Act X of 1877, ss. 237, 274, 276	698
See Act X of 1877, ss. 266, 268.	21
ATTEMPT TO COMMIT OFFENCE. See Act XLV of 1860, ss. 75, 457, 511	773
AUCTION-PURCHASER. See Estoppel	805
See Hindu Law	353
AWARD. See Hindu Law	738
BOND.—Interest—Penalty.] A bond for the repayment of money lent provided that such money should be repaid on a certain date; that interest at the rate of Rs. 7-8-0 per cent. per annum should be paid at the end of every year; and that, if default were made in the payment of interest, such money should be repaid with interest at the rate of Rs. 37-8-0, per cent. per annum. The bond contained an hypothecation of immoveable property as collateral security. In a suit on the bond, the obligee, the obligor having failed to pay any interest, claimed interest from the date the bond became due to the date of institution of the suit at Rs. 37-8-0, the defaulting rate. <i>Held</i> , following the principal laid down in <i>Bansidhar v. Bu Ali Khan</i> , that the provisions of the bond, as regards the rate of interest payable on default of the payment of interest, were in their nature penal and so excessive that, as a matter of equity, they should not be enforced.	
<i>Held</i> , also, with reference to the question what was a reasonable amount of compensation for the obligor to pay for breach of contract, that unpaid interest should bear interest at the rate of Rs. 11-4-0 per cent. per annum from the date of default to the date of the High Court's decree.	
<i>Khurram Singh v. Bhawani Bakhsh</i>	440
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CONSTRUCTION OF ACT WITH REFERENCE TO BILL. See Act XLV of 1860, s. 214	283
DECREE. See Interest	775
See Money-decree.	
INSTRUMENT OF GIFT. See Muhammadan Law	290

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CONTEMPT. <i>See</i> Act XLV of 1860, s. 211	323
CONTRACT.— <i>Condition Precedent—Formally signed contract.</i>] Where two parties have come to a final agreement, the mere fact that at the time of their doing so they intend to embody the terms of such agreement in a formal instrument does not make such agreement less binding on them.	
<i>Whymper and Co. v. Buckle and Co.</i>	469
CONTRACT— <i>Contract by Government to grant proprietary rights in land—Contract entered into or acts done in the exercise of sovereign powers.</i>] The plaintiff in this suit, alleging that the Government had granted him a lease of certain land with the rights of a proprietor, promising to confer on him the proprietary rights in such land if he did certain things, that he had done such things; that the Government had refused to perform such promise and had conferred the proprietary rights in such land on another person, claimed by virtue of the contract between him and the Government, and as against the Government and such person proprietary possession of such land.	
<i>Held per SPANKIE, J.</i> , that, assuming that the Government had entered into such a contract with the plaintiff as alleged, the suit would not lie, inasmuch as such contract was entered into, and the refusal of the Government to confer the proprietary rights in such land on the plaintiff, and the grant by it of such rights to such person, were acts done in the exercise of sovereign powers.	
<i>Held per STUART, C. J.</i> , that the Government had entered in the contract alleged by the plaintiff; that the suit would lie, as the Government had not entered into such contract in the exercise of sovereign powers, but in the capacity of a private owner; but that the plaintiff's case failed, as he had not performed his part of such contract.	
<i>Kishen Chand v. The Secretary of State for India in Council</i>	829
—————OF SALE.— <i>Vendor and purchaser.</i>] The vendor of certain immovable property agreed to sell such property and the purchaser agreed to purchase it on the understanding that the purchaser should retain a part of the purchase money, and therewith discharge certain bond-debts due by the vendor for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. <i>Held</i> , in a suit by the purchaser for the possession of such property in virtue of such conveyance, that, the purchaser not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed and the suit was therefore not maintainable.	
<i>Ikkbal Begam v. Gobind Prasad</i>	77
CONVICTION OF SEVERAL OFFENCES. <i>See</i> Act X of 1872, ss. 314, 453, 454	305
CORPUS DELICTI. <i>See</i> Act XLV of 1860, s. 302	383
COURT-FEES. <i>See</i> Act VII of 1870.	
CULPABLE HOMICIDE NOT AMOUNTING TO MURDER. <i>See</i> Act XLV of 1860, ss. 299, 300, 302, 304A. 325	776
CUSTODY OF MINOR. <i>See</i> Act IX of 1861	403, 506
CUSTOM. <i>See</i> Act XV of 1877, sch. ii, Nos. 115, 120. Hindu Law	355, 738
—————OP PRIMOGENITURE. <i>See</i> Muhammadan Law	723
DAUGHTER'S SON. <i>See</i> Hindu Law	134
DEATH OF DECREE-HOLDER BEFORE SALE. <i>See</i> Act X of 1877, ss. 365, 366	759
—————PLAINTIFF-APPELLANT. <i>See</i> Act X of 1877, ss. 2, 366, 588 (18)	844
DEBT. <i>See</i> Act X of 1877, ss. 266, 268	12
DECLARATORY DECREE. <i>See</i> Act X of 1877, s. 13	297
DECREE FOR PAYMENT OF MONEY IN "ACCORDANCE WITH WRITTEN STATEMENT." <i>See</i> Interest.	775

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DEFAMATION.— <i>Statements in judicial proceeding—Good faith—Privileged communication.</i>] The law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code and not the English law of libel and slander.	
<i>Held</i> , therefore, that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding.	
It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regards to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith.	
Abdul Hakim v. Tej Chandar Mukarji	815
DEFAMATION.—See Act XLV of 1863, s. 499	342, 664
DISCHARGE.— <i>Revival of Prosecution—Place of enquiry of trial—Enticing away married woman.</i>] A person was prosecuted before a Criminal Court in the Panjab for enticing away a married woman, with a criminal intent, an offence punishable under s. 498 of the Indian Penal Code. Such prosecution was legally instituted in such Court and such offence was properly triable by it. Such Court discharged such person under the provisions of s. 215 of Act X of 1872. Subsequently it appeared that such person was detaining such woman at a place in the North-Western Provinces, and he was prosecuted before a Criminal Code of the district in which such place was situated for the same offence as he had been prosecuted for before the Criminal Court in the Panjab, viz., enticing away such married woman, and was convicted of that offence. <i>Held</i> that, although his previous discharge did not bar the revival of a prosecution for the same offence, such prosecution could only be revived in the Panjab Court, and he could not be convicted under the latter part of s. 498 of the Indian Penal Code for detaining an enticed woman until the enticing had been proved, and such conviction had been properly set aside by the Court of Session.	
Empress of India v. Tika Singh	251
See Act X of 1872, ss. 216, 220, 298	129
DISOBEDIENCE TO ORDER BY PUBLIC SERVANT. See Act XLV. of 1860, ss. 187, 189	201
DOWER. See Gift	266
ENHANCEMENT OF RENT. See Act XVIII of 1873, ss. 12, 21	365
ENTICING AWAY MARRIED WOMAN. See Discharge	261
EQUITABLE ESTOPPEL. See Act XV. of 1877, sch. ii, Nos. 91, 114	846
See Act VIII of 1859, ss. 222, 256, 257	701
ESTOPPEL.— <i>Auction-purchaser.</i>] In 1871 <i>M</i> , the mortgagee of certain property, styling himself the owner of it, mortgaged it to <i>S</i> . In 1875 <i>M</i> became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against <i>M</i> , and <i>A</i> purchased it. <i>S</i> subsequently sued <i>M</i> and <i>A</i> to enforce the mortgage of such property to him by <i>M</i> . <i>Held</i> that, inasmuch as, if <i>S</i> had at any time sued <i>M</i> to enforce such mortgage after he had become the owner of the mortgaged property, and before <i>A</i> had purchased it, <i>M</i> would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and <i>A</i> had purchased with a knowledge of the facts, after <i>M</i> had become the owner, <i>A</i> was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to <i>S</i> 's claim.	
Seva Ram v. Ali Bakhsh	805
See Execution of decrees	585
See Hindu Law	362
See Res judicata	40

EXECUTION OF DECREE—<i>Execution of compromise—Estoppel.</i> The parties to a decree for the payment of money altered by agreement such decree as regards the mode of payment and the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor. On the 1st March 1878, the holder of such decree applied for execution of such agreement. The judgment-debtor objected that such agreement could not be executed as a decree, and such application should therefore be disallowed. <i>Held</i> (OLDFIELD, J., dissenting) that such agreement could not be executed as a decree, and such application could not be entertained, and that the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree.	
Dabi Rai v. Gokal Prasad	586
EXECUTION OF DECREE. <i>See</i> Act VIII of 1859.	
. <i>See</i> Act IX of 1871.	
. <i>See</i> Act X of 1877.	
. <i>See</i> Act XV of 1877.	
. <i>See</i> Hindu Law.	
FALSE CHARGE. <i>See</i> Act XLV of 1860, s. 211	322
FEMALES. <i>See</i> Hindu Law	46
FILING AGREEMENT TO REFER TO ARBITRATION IN COURT.	
<i>See</i> Act X of 1877, ss. 2, 522, 523, 524	286
PRIVATE AWARD IN COURT. <i>See</i> Act X of 1877, ss. 2, 526, 526, 540	427
. <i>See</i> Act X of 1877, ss. 520 (a), 525, 526	541
FINAL ORDER PASSED ON APPEAL BY THE HIGH COURT ON A QUESTION MENTIONED IN s. 244 of Act X of 1877. <i>See</i> Act X of 1877, ss. 695, 696	633
FINALITY OF ORDER SETTING ASIDE SALE. <i>See</i> Act X of 1877, ss. 311, 312, 588	554
FINDING IN FAVOUR OF RESPONDENT WHO HAD NOT APPEALED OR OBJECTED UNDER s. 561. <i>See</i> Act X of 1877, s. 566	643
FIRST AND SECOND MORTGAGERS. <i>See</i> Mortgage	632, 706
FORECLOSURE. <i>See</i> Regulation XVII of 1806	509, 653
FORGERY. <i>See</i> Act XLV of 1860, s. 214	283
FRAUDULENT REPRESENTATION BY DECREE-HOLDER. <i>See</i> Act VIII of 1859, s. 13	568
GANDHARP MARRIAGE. <i>See</i> Hindu Law	738
GIFT—<i>Possession—Dower.</i> On an issue whether an oral gift of an estate, consisting of certain taluquas and mauzas, had been made by a Muhammadan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by Muhammadan law, that the dower should be agreed upon before marriage; it may be fixed afterwards. The possessor of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration. <i>Held</i> , on the evidence, that the gift was effectively made.	
Kamar-un-nissa Bibi v. Husaini Bibi	266
. <i>See</i> Muhammadan Law.	
GOOD FAITH. <i>See</i> Act XLV of 1860, s. 499	664
. <i>See</i> Defamation	816
GRANDMOTHER. <i>See</i> Hindu Law	118
GRANT OF LAND FOR BUILDING PURPOSES. <i>See</i> Jurisdiction	669
GRIEVOUS HURT. <i>See</i> Act XLV of 1860, ss. 299, 300, 302, 304A, 325	776

GUARDIAN AND MINOR.	See Pre-emption	Page. 437
	See Act XL of 1858, s. 18	863
	See Hindu Law	536
GUILTY KNOWLEDGE.	See Act X of 1871	404

HAQ-I-CHAHARAM.—*Sale in execution of decrees of house in Mohalla—*

Wajibularz—Liability of auction-purchaser.] The zamindars of a certain mohalla claimed from the purchaser of a house situated in such mohalla which had been sold in execution of a decree one-fourth of the sale-proceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the *wajibularz*. That document stated, *inter alia*, that, when a house in such mohalla was sold, a cess called *chaharam* was received by such zamindars "according to the understanding arrived at between the seller and the zamindars." Held that such zamindars were not entitled under the terms of the *wajibularz* to one-fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser, could not be regarded as the "seller," and it was only the "seller" who was liable; that the terms of the *wajibularz* were applicable only to private and voluntary sales and not to execution-sales: and that under these circumstances the suit must be dismissed.

Beni Madho v. Zahurul-Haq

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HIGH COURT, POWERS OF REVISION.—*Security for keeping the peace*

—*Defect in form of summons not prejudicing persons required to show cause—Act X of 1872 (Criminal Procedure Code), ss. 297, 491, 492.*

Certain persons were convicted by a Magistrate of the first class of assault, an offence punishable under s. 352 of Act X of 1877. The case was brought to the knowledge of the High Court by the complainant preferring a petition to it, together with a copy of the Magistrate's order. This petition was laid before Straight, J., who, observing that the case was one in which the Magistrate should have taken security from such persons for keeping the peace, as provided by s. 469 of Act of 1872, directed the Magistrate to summon such persons to show cause why they should not be required, under s. 491 of that Act, to enter into a bond to keep the peace. The Magistrate accordingly summoned such persons as directed, the summonses setting forth that they were issued "under the orders of the High Court." The Magistrate took evidence on behalf of such persons, and eventually made an order requiring such persons to enter into a bond to keep the peace. Such persons were fully aware of the order made by Straight, J. Such persons applied to the High Court to set aside the order requiring them to enter into a bond to keep the peace, on the ground that the Magistrate had not proceeded of his own motion, but under the order of Straight, J., which was made without jurisdiction, and on the ground that the summonses had not set forth the report or information on which they were issued.

Held by STUART, C. J., that, inasmuch as Straight, J., when he made his order, represented the full authority and jurisdiction of the High Court, such order was final, and the application could not be entertained.

Held by PEARSON, J., SPANKIE, J., and OLDFIELD, J. (SPANKIE, J., doubting whether such order could be questioned) that the order of Straight, J., was one which he was competent to make as a Court of Revision under s. 297 of Act X of 1872.

Held by PEARSON, J., and SPANKIE, J., that, inasmuch as such persons had not been in the slightest degree prejudiced by the defect in the summonses which were issued to them, such defect was not a ground on which to set aside the Magistrate's order requiring them to enter into a bond to keep the peace.

Empress of India v. Muhammad Jafir

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Act X of 1877 (Civil Procedure Code), s. 622.] S. instituted a suit against T in the Court of an Assistant Collector of the first class, who dismissed the suit. On appeal by

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S, the District Court gave her a decree. On second appeal by T the High Court held that, as the suit was one of the nature cognizable in a Court of Small Causes, a second appeal would not lie in the case, and dismissed it. T thereupon applied to the High Court to set aside, under the provisions of s. 622 of Act X of 1877, the proceedings of both the lower Courts on the ground that both those Courts had exercised a jurisdiction not vested in them by law. Held that the High Court was competent to entertain such application and to quash the proceedings of both the lower Courts, under the provisions of s. 622 of Act X of 1877, and the proceedings of both those Courts should be quashed.

Observations by STUART, C. J., on the powers of revision of the High Court under s. 623 of Act X of 1877.

Sarnam Tewari v. Sakina Bibi . . . 417
HIGH COURT, POWERS OF REVISION—Act X of 1877 (Civil Procedure Code), s. 622.] Per PEARSON, J., OLDFIELD, J., and STRAIGHT, J.—When, under s. 622 of Act X of 1877, the High Court has called for the record of a case in which no appeal lies to it, it may, under that section, pass any order in such case which it might pass if it dealt with the case as a second appeal under chapter XLIII of that Act.

Per STUART, C. J.—The High Court may, under that section, pass in such case any order, whether in regard to fact or law, as it thinks proper.

Where in a case of the execution of a decree in which no second appeal lay to the High Court, the appellate Court held, on the construction of the decree, that it awarded interest on the principal amount of the decree, the High Court, under s. 622 of Act X of 1877, holding that the appellate Court had misconstrued the decree, and that the decree did not award such interest, modified the order of the appellate Court accordingly.

In the matter of the petition of Maulvi Muhammad v. Syed Husain . . . 203

Regulation XVII of 1806—
Redemption of Mortgage.] After a mortgage had been foreclosed under the provisions of Regulation XVII of 1806, the representative of the mortgagor deposited the mortgage-money in Court. The District Judge ordered that the money should be paid to the mortgagee on the ground that the mortgagor had not been personally served with the notice required by s. 8 of that Regulation, and that it did not appear that she had been aware of the foreclosure proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the terms of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under s. 622 of Act X of 1877.

Held that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction and should be set aside.

Hazari Lal v. Kheru Rai . . . 576

Act X of 1877, s. 622.—Sanction for
prosecution—Act X of 1873 (Criminal Procedure Code), ss. 468, 469.] The discretionary power of a Civil Court, before or against which an offence mentioned in ss. 468 or 469 of Act X of 1873 is alleged to have been committed, to grant or withhold sanction to the prosecution for such offence, is not subject to revision by the High Court under s. 622 of Act X of 1877.

In the matter of the petition of Madho Prasad . . . 508
HINDU LAW—Alienation of joint undivided family property by Father—Rights of sons.] Z, a member of a joint Hindu family consisting of himself and his sons, in January 1869, in order to raise money to pay off family debts and for family necessities, conveyed a two-anna share out of an eight-anna share of a village belonging to the family to B, who sued him on such conveyance for possession of the two-anna share,

- and obtained a decree, and possession of such share. In June 1879 the sons and the grandson of *Z* sued *B* to recover such share. *Held*, with reference to the ruling of the Privy Council in *Suraj Bansi Koer v. Shoo Persad Singh*, that the suit was not maintainable.
- Darsu Pandey v. Bikarmajit Lal 125
- HINDU LAW—*Daughter's Son—Succession.*** According to Mitakshara law a daughter's son takes his maternal grandfather's estate as full proprietor, and on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather. His *gotraja-sapindas*, or the persons related to him through his father, have, therefore, preferential right to succeed him to the persons related to him through his mother.
- Sibta v. Badri Prasad 134
- *Guardian and minor—Act XL of 1858.* The mother and guardian of a Hindu minor, although a certificate of guardianship has not been granted to her under Act XL of 1858, may deal with the estate of the minor, within the limits allowed by the Hindu Law.
- Roshan Singh v. Harkishan Singh 535
- *Jains—Bindala Jains—Inheritance—Alienation by Widow—Mitakshara—Act X of 1865 (Succession Act), s. 331.* The term "Hindu" in s. 331 of Act X of 1865 means and includes a "Jain," and consequently in matters of succession Jains are not governed by that Act.
- The ordinary Hindu law of inheritance is to be applied to Jains in the absence of proof of custom or usage varying that law. The alienation by gift by the widow of a Bindala Jain of her husband's ancestral property is invalid according to the Mitakshara, which is the ordinary law governing Bindala Jains in the absence of custom to the contrary.
- Bachebi v. Makhan Lal 55
- *Joint Hindu family—Alienation—Liability of the Joint undivided family property for family debts—Sale in Execution of Decree against one member of Family Property—Rights of other members.* During the minority of *S*, a member of a joint Hindu family, consisting of himself, his father *J*, and his uncle *H*, and while he was living under the natural guardianship of his father, *R* sued *J* and *H*, but not *S*, as the heirs of *P*, *S*'s grandfather, and as the heads and representatives of the joint family, to recover a joint family debt incurred to *R* by *P*, before *S*'s birth, by the sale of the joint family estate which had been hypothecated by *P* as security for the payment of such debt. *R* obtained a decree in this suit against *J* and *H* for such debt, such decree directing the sale of the joint family estate for the satisfaction of the debt. In the execution of such decree the rights and interests of *J* and *H* in such estate were put up for sale and were purchased by *R*, who took possession of such estate. *Held*, in a suit by *S* to recover his share of the joint family estate, that, under the circumstances, it must be held that the decree against *J* and *H* was made against them as representing the joint family, and therefore such decree was properly executable against such estate, notwithstanding that *S* was not formally brought on the record of the suit in which such decree was made, and *S* could not recover his share of such estate. *Bissessur Lall Sahoo v. Luckmessur Singh* followed: *Deendyal Lall v. Jugdeep Narain Singh* distinguished.
- Ram Sevak Das v. Raghubar Rai 72
- *Joint undivided Hindu family—Alienation by father—Right of son—Partition—Grandmother—Appeal—Parties to suit.* *B*, a member of a joint undivided Hindu family consisting of himself and his son *R*, as the manager of the family, borrowed moneys for lawful purposes and executed a bond for their repayment in which he hypothecated a share of mauza *B*, such share being ancestral property, as collateral security for their repayment, with the knowledge and approbation of *R*. The obligee of such bond sued *B* thereon and obtained a decree, which directed the sale of such share, and such share was put up for sale

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and was purchased by *C. B* subsequently sued *B* and his mother for partition of the family property, including such share, claiming a one-third share of such property. *C* was made a defendant in the suit, and so was *P.*, *B*'s grandmother, who claimed to share equally with the other members of the family in such property. *Held*, that it must be presumed that *B* was sued on such bond, and that the decree in such suit was made against him as the head of the family, and *B* could not recover from *C* the share of mauza *B*. *Held* also that *P* was not entitled on partition to a share of the family property.

On appeal to the High Court from the decree of the Court of first instance, *B* made respondents certain persons who after the passing of that decree had purchased at execution sales the rights and interests of *B* in portions of the landed estate of the family. *Held* that such persons not being affected by that decree, the Court could not make any order respecting their claims, and they had been unnecessarily made parties to the appeal.

Radha Kishen Man v. Bachaman 118
HINDU LAW—Mitakshara—Inheritance—Females.] According to Mitakshara Law none but females expressly named can inherit, and the widow of the paternal uncle of a deceased Hindu not being so named is therefore not entitled to succeed to his estate.

Gauri Sahai v. Rukko

—**Mitakshara—Joint undivided property—Widow's rights—Partition.**] A Hindu widow, entitled by the Mitakshara Law to a proportionate share with sons upon partition of the family estate, can claim such share, not only *quoad* the sons, but as against an action-purchaser at the sale in the execution of a decree of the right, title, and interest of one of the sons in such estate before voluntary partition.

Bilaso v. Dina Nath

—**Mitakshara—Mortgage of Joint ancestral property by Father—Sale of property in execution of a decree against Father—Son's Right.**] The ancestral estate of a joint-Hindu family, consisting of a father and his minor son, was mortgaged by the father, as the head of the family and manager of the estate, as security for the repayment of moneys borrowed for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the estate, and obtained a decree against him, directing its sale, and sought to bring the estate to sale in the execution of such decree. *Held*, in a suit by the minor son to protect his share in the estate from sale in the execution of such decree, that the suit in which such decree was made, and such decree being regarded as a suit against the father, and as a decree made against him as representing the family, such decree might be executed against the estate, notwithstanding the minor son had not formerly been joined as a defendant in such suit. *Bissessar Lal Sahoo v. Luckmessur Singh* followed: *Deendyal Lal v. Jydeep Narain Singh* distinguished.

Gaya Din v. Raj Bansi Kuar

—**Regulation VII of 1822—Award—Act IX of 1871 (Limitation Act), sch. ii, No. 44—Act XV of 1877 (Limitation Act), sch. ii, No. 45—Succession—Custom—Illegitimate son—"Gandhap" marriage.**] *D* died in 1860, leaving him surviving his first wife *G*, his second wife *B*, his mother *E*, and *M* his son by a woman to whom he had been married by the "gandhap" form of marriage. On *D*'s death *G*'s name was registered in the record-of-rights in respect of his proprietary rights in a certain village. In 1871 *G* died and on her death *B*, *E*, and *M* preferred separate claims to have their names registered in respect of such rights. The Assistant Settlement Officer, before whom these claims came for decision, professing himself unable to decide which of the claimants was in possession, and observing that it was not shown that possession was joint, referred the case to the Settlement Officer. The Settlement Officer, without making any inquiry, disposed of the case on

the evidence taken by the Assistant Settlement Officer, and held that the claimants were in joint possession of such rights, and it was proper that the name of each should be registered in respect of a one-third share of such rights. He at the same time intimated to the parties that, unless they settled their claims in the Civil Court or by arbitration, before the *kheswat* was framed, it would be framed as he had directed. In 1873 *B* died and on her death *M* procured the registration of his name in respect of her one-third share. In 1879 *B* sued *M* for possession of the one-third share which he had obtained under the proceeding of the Settlement Officer, and of *B*'s one-third share, claiming as heir to her deceased husband *D*, and alleging that *M* was not the legitimate son of *D*, and was therefore not entitled to succeed to such rights. *M* set up as a defence that, as the proceeding of the Settlement Officer was an award under Regulation VII of 1822, and the suit was one to contest such award, and it had not been brought within three years from the date of such award, the suit was barred by limitation; that he was the legitimate son of *D*, and therefore entitled to succeed; and that, assuming he was not legitimate, he was entitled to succeed by the custom of the village. In support of such custom *M* relied on the following entry in the village *wajib-ul-arz*:—"In this village a mistress treated as a wife and the child of such a mistress shall also have a right to transfer property and to obtain and receive property."

Held that the suit was not barred by limitation under No. 44, sch. ii of Act IX of 1871, or No. 46, sch. ii of Act XV, of 1877, as the proceeding of the Settlement Officer was not an award under Regulation VII of 1822.

Held, also that a marriage by the "*gandharv*" form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the *status* of wife and making the offspring legitimate. Also, with reference to the entry in the *wajib-ul-arz*, that it did not necessarily place illegitimate children on an equality with legitimate as heirs; and if that was its intention, it was ineffectual, as parties could not by agreement alter the law of succession; and if the entry was regarded as evidence of custom it was not conclusive.

Bhaoni v. Maharaja Singh 738

HINDU LAW—*Hindu widow—Alienation—Reversioner—Estoppel.* A Hindu widow in possession of her deceased husband's separate landed estate, her deceased husband's mistress, and his illegitimate daughter, and the next reversioner to such estate, with the object of adjusting family disputes, entered into an arrangement by an instrument in writing for the distribution of such estate. A remoter reversioner to such estate was a witness to such instrument, and took a prominent part in making such arrangement, and the same had his full consent. *Held* that such remoter reversioner was estopped by such conduct from afterwards questioning the legality and genuine character of such distribution and the validity of assignments made by the persons who shared in such distribution.

Observations on the power of a remoter reversioner to question alienations by a Hindu widow in which the next reversioner has concurred.

Sia Dasi v. Gur Sahai 362

Husband and wife—Liability of husband for wife's debts. A husband (Hindu) is not liable for a debt contracted by his wife, except where it has been contracted under his express authority, or under circumstances of such pressing necessity that his authority may be implied.

A wife and her husband's brothers jointly executed a bond for the repayment of moneys borrowed to pay a debt due by her husband and his brothers and to carry on the cultivation of lands held by her husband

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and his brothers, and hypothecated the family-house as collateral security for the repayment of such money. *Held* that the wife was not justified in borrowing money to pay her husband's debt, and the want of money for cultivation of his lands would not justify her in pledging his credit for a joint loan taken by his brothers in which his liability would extend to the whole debt, nor would it justify her hypothecating his property, and the husband and his property were therefore not liable for the bond-debt.

Pusi v. Mahadeo Prasad

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HINDU LAW—Joint Hindu Family—Joint family Debt—Sale of joint family property in execution of decree.] When a member of a joint Hindu family is sued for a family debt it may be assumed that he is sued for the same as the representative of the family; and when the decree in such a suit is substantially one in respect of the family debt and against the representative of the family, such decree may properly be executed against the family property.

Held, therefore (STRAIGHT, J., dissenting), where the father of a joint Hindu family, as the representative of the family, borrowed money for family purposes, hypothecating family property for the repayment of such money, and in a suit to recover such money by the sale of such property and other family property, a decree was made against him directing the sale of the hypothecated property and such other property, and such properties were sold in execution of such decree, that, having regard to these facts, it was reasonable to hold that the father was sued as the representative of the family, and such decree was made against him in that capacity, and was so executed against him, and consequently his sons were not entitled to recover their legal shares of such properties from the auction-purchaser. *Bissessur Lall Sahoo v. Luchmessur Singh* followed; *Deendyal Lal v. Jugdeop Narain Singh* distinguished.

Per STRAIGHT, J.—That, the father alone having been a party to such suit, and the sons not having been parties thereto either personally or by a formally constituted representative and such decree being against the father alone, the rights and interest of the sons in the family properties were not affected by the sale of such properties in execution of such decree, and the sons were entitled to recover their legal shares of such properties from the auction-purchaser. *Deendyal Lal v. Jugdeop Narain Singh* followed.

Ram Narain Lal v. Bhawani Prasad

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Joint Hindu Family—Joint Family property—Joint Family debt—Execution of decree against Father—Rights of Sons.] *R*, a Hindu father, gave certain persons a bond in which he hypothecated the joint undivided property of his family. Such persons obtained a decree against *R* on such bond, in the execution of which "such rights and interests only as *R* had, as a Hindu father, in a joint undivided family," were put up for sale. *Held* that although *R* might have, as a Hindu father, a power of dealing with the interests of his sons, that circumstance would not make such interests his own, so as to pass them by a sale which affected his own interests only, and the auction-purchasers could be held only to have purchased his interests.

Nanhak Joti v. Jaimangal Chaubey

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Joint Hindu Family—Widow's Right of residence in Family Dwelling-house—Auction-purchaser.] The widow of a member of a joint Hindu family can claim a right of residence in the family dwelling-house, and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. *Gauri v. Chandramani* and *Mangala Debi v. Dinanath Bose* followed.

Talemand Singh v. Rukmina

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HINDU WIDOW. See Act XIX. of 1873 400

HOLIDAY. See Act X of 1877, s. 311. Pre-emption.

ILLEGITIMATE SON. See Hindu Law 738

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ILLICIT POSSESSION OF LIQUOR. <i>See</i> Act X of 1871	404
IMMORAL CONSIDERATION. <i>See</i> Act IX of 1872, ss. 2 (d), 25 (2),	787
INSOLVENT. <i>See</i> Act X of 1877, ss. 28, 31	799
JUDGMENT-DEBTOR. <i>See</i> Act X of 1877, s. 351	531
INSTALLMENT-BOND. <i>See</i> Act X of 1877, s. 13	297
INSUFFICIENTLY STAMPED DOCUMENT, ADMISSIBILITY IN EVIDENCE OF. <i>See</i> Act XVIII of 1869, s. 3 (25), sch. ii, No. 5	581
INTEREST— <i>Decree for payment of money "in accordance with written statement"—Construction of decree.</i>] A decree for money directed that its amount should be payable "according to the terms of the judgment-debtor's written statement." In his written statement the judgment-debtor had promised to pay interest on the judgment-debt if the same were not discharged by a certain day. <i>Held</i> , having regard to the decision of the Full Bench in <i>Debi Charan v. Pirbhu Din</i> that the judgment-debtor having failed to discharge the judgment debt by such day, he was bound by the terms of the decree to pay interest on its amount.	
<i>Ram Nandan Rai v. Lal Dhar Rai</i>	775
<i>See</i> Act XVIII of 1869, s. 3 (5) (25) and sch. ii, No. 11	269
<i>See</i> Bond	440
<i>See</i> Regulation XVII, of 1806, s. 7	653
IRREGULAR COMMITMENT. <i>See</i> Act X of 1872, ss. 38, 63	358
IRREGULARITY NOT AFFECTING MERITS. <i>See</i> Act X of 1877, s. 578	821
JAINS <i>See</i> Hindu Law	55
JOINDER OF CHARGES. <i>See</i> Act X of 1872, ss. 314, 453, 454	305
JURISDICTION— <i>Cantonment—Grant of land for building purposes—Right of Government to eject granted—Regulations and Orders for the Bengal Army—Alluvial land—Assessment of rent.</i>] Certain ground situate within the limits of a cantonment was granted for building purposes by the military authorities in 1802. In June 1873 such cantonment was abandoned and the ground comprised therein was made over to the Collector of the district in which it was situate. The Government subsequently sued <i>P</i> , who had succeeded to such grant, claiming (i) a declaration of its proprietary right to the ground comprised in such grant and to the alluvial accretions to such ground, (ii) that <i>P</i> should be directed to pay rent for such ground and such alluvial accretions, and (iii) that, should <i>P</i> refuse to pay the rents fixed, she might be ejected and the Government put in possession. <i>Held</i> that, inasmuch as under the Military Regulations relating to such grants such a grant cannot be resumed by the Government without a month's notice and without payment of the value of such buildings which may have been authorised to be erected, and as the Civil Court had no jurisdiction in the matter of assessing rent on such alluvial accretions, which were outside the original grant, the Government was not entitled to the second and third reliefs it claimed, but was entitled only to a declaration of its proprietary title to such ground and to such alluvial accretions.	
<i>Patterson v. The Secretary of State for India</i>	669
<i>Lambardar and Co-sharer—Suit for arrears of revenue—Mortgagee Act XVIII of 1873 (N.-W. P. Rent Act), s. 93 (g)—Act VIII of 1879, ss. 11, 12.</i>] <i>Per</i> STUART, C.J., and STRAIGHT, J.—The term "co-sharer" in s. 93 (g) of Act XVIII of 1873 does not include the mortgagee of a co-sharer, and therefore a suit by a lambardar against the mortgagee of a co-sharer for arrears of Government revenue is not one which, under that section, is cognizable in a Court of Revenue, but is one which is cognizable in a Civil Court.	
<i>Per</i> PRABSON, J., and OLDFIELD, J.— <i>Contra.</i>	
<i>Bhawani Gir v. Dalmardan Gir</i>	144
<i>Return of plaint to be presented to the proper Court—Rejection of plaint—Cause of action.</i>] The plaintiff in this suit claimed in a Civil Court (i) a declaration of his right to certain land; (ii) that cer-	

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tain leases of such land, so far as their terms exceeded the term of settlement, should be cancelled; and (iii) arrears of rent for such land. The Court held as regards claim (i) that the plaint did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right; as regards claim (ii) that, with reference to the terms of s. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen; and as regards claim (iii) that it was cognizable in a Court of Revenue; and it directed that under s. 57 of Act X of 1877 the plaint should be returned to the plaintiff to be presented to the Revenue Court. *Held* that under the circumstances the plaint should have been rejected and not returned.

Nagar Mal v. Macpherson 765

JURISDICTION—*Suit for redemption of Mortgage—Valuation of suit.*

The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right, *quid* such share, was under Rs. 1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding Rs. 1,000 was due, had been tacked to the mortgage, and that until such sum had been satisfied the plaintiff could not recover possession of his share. *Held*, on the question whether the Munsif had jurisdiction, that the value of the subject-matter of the suit was the value of the mortgagee's right, *quid* the plaintiff's share; and as the value of such right did not exceed Rs. 1,000, even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognizable in the Munsif's Court. The principle laid down in *Gobind Singh v. Kallu* followed.

Bahadur v. Nawab Jan 823

Civil Court—*Determination of title by Revenue Court—Res judicata—Act XVIII of 1873 (N.W. P. Rent Act), ss. 36, 39—Act X of 1877 (Civil Procedure Code), s. 13.* *S* caused a notice of ejectment to be served upon *K* in respect of certain land, alleging that he held the same by virtue of a lease which had expired. *K* contested his liability to be ejected under s. 39, denying that he held the land by virtue of such lease and alleging that he held it under a right of occupancy. The Revenue Court decided that *K* held the land under a right of occupancy and not under such lease. *S* thereupon sued *K* in the Civil Court, claiming possession of such land, on the allegation that *K* was a trespasser wrongfully retaining possession thereof after the expiration of his lease. *Held* that the suit was cognizable in the Civil Courts, and the decision of the Revenue Court did not render the matter in issue *res judicata*. The provisions of s. 13 of Act X of 1877 do not apply to applications such as those under s. 39 of Act XVIII of 1873.

Sukhdaik Misr v. Karim Chaudhri 521

Civil Court—*Rent-free and Revenue-free tenures—Assessment and settlement of revenue-free land—Act XIX of 1873 (N.W. P. Land Revenue Act), ss. 82, 83, 87, 88, 89, 241.* Certain land was settled with the defendants in this suit. The Settlement Officer having declared that the plaintiffs in this suit had acquired a proprietary right to such land under the provisions of s. 82 of Act XIX of 1873, and were entitled to hold it rent-free, the defendants applied to the Settlement Officer to assess such land and to settle it with the plaintiffs as the persons in actual possession as proprietors. This having been done by the Settlement Officer, the plaintiffs sued the defendants to be maintained in possession of such land free of revenue, and for the cancellation of the Settlement Officer's order. *Held* that under s. 241 of Act XIX of 1873, the suit was not cognizable in the Civil Courts.

Zalim Singh v. Ujagar Singh 367

JURISDICTION—Partition of Mahal by arbitration—Sir-land—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 125.] When the co-sharers of a mahal agree to have such mahal partitioned by an arbitrator, they must be understood to agree to the arrangements made by such arbitrator, and if he provides by his award that the sir-land of one co-sharer that falls by lot into the share of another co-sharer should be surrendered, that land must be given up by the co-sharer who has hitherto cultivated it. Such co-sharer's consent to such arrangement must be understood to have been given when he agreed to arbitration. S. 125 of Act XIX of 1873 must not be regarded as empowering a co-sharer, who has once given his consent to surrender the cultivation, to continue to cultivate the land against the will of the co-sharer who has become the owner of it by partition.

An agreement to refer to arbitration the partition of a mahal provided that, if sir-land belonging to one co-sharer were assigned to another co-sharer, the co-sharer to whom the same belonged should surrender it to the co-sharer to whom it might be assigned. The arbitrator assigned certain sir-land belonging to the defendants in this suit to the plaintiffs. The partition was concluded according to the terms of the award. The defendants refused to surrender such land to the plaintiffs. The plaintiffs distrained the produce of such land, alleging that it was held by certain persons as their tenants and arrears of rent were due. The defendants thereupon sued the plaintiffs and such persons in the Revenue Court, claiming such produce as their own. The Revenue Court held that such distress was illegal, as such land was in the possession and cultivation of the defendants as occupancy-tenants under s. 125 of Act XIX of 1873. The plaintiffs subsequently sued the defendants in the Civil Court for possession of such land, basing such suit on the partition proceedings. Held that the decision of the Revenue Court did not debar the Civil Courts from determining the rights of the parties under the partition, and such suit was cognizable in the Civil Courts.

Abhai Pandey v. Bhagwan Pandey

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—**Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 10, 36, 39, 95—Ejectment of tenant—Determination of nature and class of tenancy—Determination of title—Res judicata.]** A suit for a declaration that the defendant holds an estate paying revenue to Government as a manager subject to ejectment at will, and not under a perpetual lease at a fixed rate of rent, and for the defendant's ejectment, is one cognizable by the Civil Courts.

In such a suit, if the relationship of landholder and tenant between the parties be established, then the Revenue Court only can make an order for the defendant's ejectment, or for determining the nature and class of his tenure, that is to say, whether he is a tenant at fixed rates within the meaning of s. 4 of Act XVIII of 1873, or an ex-proprietary tenant, or an occupancy tenant, or a tenant without a right of occupancy.

The question of title raised in such a suit is not concluded by the orders of the Revenue Courts establishing the relationship of landlord and tenant between the parties, on an application having been made by the defendant under s. 39 of Act XVIII of 1873, upon a notice having been served upon him by the plaintiff under s. 36 of that Act, objecting to his ejectment.

Muhammad Abu Jafar v. Wali Muhammad

81

—**Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 44, 93—Landholder and Tenant—Res judicata—Improvements by tenant—Well.]** A suit in which the matter in dispute is whether a landholder is entitled to demolish a well constructed by a tenant is not one cognizable in the Revenue Courts but in the Civil Courts.

The decision of a Revenue Court, in a suit by a landholder against a tenant under s. 93 (b) of Act XVIII of 1873 for the ejectment

of the tenant on the ground of misconduct in constructing a well, that the tenant could not be ejected from his holding without compensation being given to him for his outlay in constructing it, is not a determination of the landholder's right to demolish the well as having been constructed by a person not having a right to construct it, and consequently such a decision is not a bar to a suit by the landholder in the Civil Court for the demolition of the well as having been so constructed.

S. 44 of Act XVIII of 1873 implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and therefore, where a well constructed by a tenant benefits the land held by him, a suit by the landholder in the Civil Court for its demolition as having been made without his consent is not maintainable.

Raj Bahadur v. Birmha Singh 85

JURISDICTION—Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act), s. 93 (g)—Relations resembling contract—Act IX of 1872 (Contract Act), ss. 69, 70—Suit of the nature cognizable in Small Cause Court—Second appeal—Act X of 1877 (Civil Procedure Code), s. 586.] On the death of *K* a dispute arose among her heirs as to the succession to the share of a village of which she was the recorded proprietor. In January 1874, *N*, who was not one of her heirs, and who was not a shareholder of such village, was recorded in the revenue register as lambardar in respect of her share, and was so recorded until February 1878, when his name was expunged, and the name of *B*, who was one of the heirs, was recorded as the proprietor of such share. *N* subsequently sued *B* to recover Rs. 70-13-4, being the amount which he had paid on account of revenue in respect of such share during the period between January 1874 and February 1878, instituting such suit in a Civil Court (Munsif). Held that the suit was not one cognizable in a Revenue Court under s. 93 (g) of Act XVIII of 1873, but one cognizable in a Civil Court. Held also that the suit was one for damages under s. 70 of Act IX of 1872, within the meaning of s. 6 of Act XI of 1865, and accordingly of the nature cognizable in a Court of Small Causes, and no second appeal in the suit would lie.

Nath Prasad v. Baijnath 66

Revenue Court—Wajib-ul-arz—Act XVIII of 1873 (N.-W. P. Rent Act), s. 93 (a)—Landholder and Tenant—Second appeal—Suit of the nature cognizable in Small Cause Court—Act X of 1877 (Civil Procedure Code), s. 586.] A suit by a landholder against a tenant for Rs. 130, being the value of a moiety of the produce of a grove of mangoes held by such tenant, such amount being claimed in virtue of an agreement recorded in the *wajib-ul-arz*, and not in virtue of any custom or right, is not cognizable in the Revenue Court, but is cognizable in a Court of Small Causes, and consequently no second appeal in the suit will lie.

Sarnam Tewari v. Sakina Bibi 37

Jurisdiction to complete trial—Transfer of Magistrate while trying a case.] Mr. *M* was appointed by the Local Government, under s. 37 of Act X of 1872, a Magistrate of the first class, under the designation of Joint-Magistrate, in the district of Meerut. He was subsequently appointed to officiate as Magistrate of the district of Meerut during the absence of Mr. *F* or until further orders. While so officiating he was appointed by a Government Notification, dated the 10th July 1880, to officiate as Magistrate and Collector of Gorakhpur, "on being relieved by Mr. *F*." He was relieved by Mr. *F* in the forenoon of the 23rd July 1880; and in the afternoon of that day, under the verbal order of Mr. *F*, he proceeded to complete a criminal case which he had commenced to try while officiating as Magistrate of the district of Meerut. All the evidence in this case had been recorded, and it only remained to pass

judgment. Mr. *M* accordingly passed judgment in this case and sentenced the accused persons to various terms of imprisonment. *Held* (SPANKIN, J., dissenting) that Mr. *M* retained his jurisdiction in the district of Meerut so long as he stood appointed by the Government to that district and no longer, and the effect of the order of the 10th July 1880 was to transfer him from the district of Meerut from the moment he was relieved by Mr. *F* of the office of Magistrate of that district, and from that moment he no longer stood appointed to that district and could exercise no jurisdiction therein as a Magistrate of the first class; and that therefore the conviction of such accused persons had been properly quashed on the ground that Mr. *M* had no jurisdiction.

Empress of India *v.* Anand Sarup 563
JURISDICTION OF SMALL CAUSE COURT. See Act XI of 1865 168, 747

LAMBARDAR AND CO-SHARER. See Jurisdiction 144
 See Mortgage 177
 See Profits 186

LAND. See Act XV of 1877, s. 28 435

LANDHOLDER AND TENANT—Trees—Hypothecation. A tenant with a right of occupancy can only make a valid hypothecation of the trees on the land he holds for the term of his tenancy; with his ejectment from such land and the cessation of his tenancy such an hypothecation ceases to be enforceable.

Ajudhia Nath *v.* Sital 567

DUTY OF. See Act XLV of 1860, ss. 187, 188 201
LEGAL REPRESENTATIVE OF DECEASED JUDGMENT-DEBTOR. See Act XV of 1877, sch. ii, No. 179 517

MORTGAGOR. See Mortgage 413

LIMITATION—Bond payable by instalments—Waiver.] On the 24th May 1866, *H* gave *A* a bond payable by instalments which provided that, if default were made in the payment of one instalment, the whole should be due. The first default was made on the 28th June 1866. No payment was made after Act IX of 1871, sch. ii, No. 76, came into force. *Held*, in a suit upon such bond, that limitation began to run when the first default was made, and no waiver before Act IX of 1871 came into force could affect it.

Ahmad Ali *v.* Hafiza Bibi 514

See Act XV of 1877.
 See Res judicata 40

MAGISTRATE OF THE DISTRICT. See Act X of 1872, s. 47 749

MAJORITY. See Act IX of 1875, s. 3 598

MARZ-UL-MAUT. See Muhammadan Law 731

MASTER AND WORKMEN. See Act XIII of 1859 744

MESNE PROFITS. See Act X of 1877, s. 43 543
 s. 44 680

Regulation XVII of 1806, s. 7 653
MINOR. See Act IX of 1875, s. 3 598

Pre-emption 437

Mortgage 408

WIFE. See Act IX of 1861 403, 506

MONEY-DECREE—Decree enforcing Hypothecation.] The obligee of a bond for the payment of money, in which immoveable property was hypothecated as collateral security, sued the obligor upon such bond claiming to recover the moneys due thereunder from the obligor personally and by the sale of the hypothecated property. He obtained a decree in such suit in these terms:—"That the claim of the plaintiff, with costs of the suit and future interest at eight annas per cent. per mensem, be decreed."

Held by the majority of the Full Bench that such decree was not merely a money-decree, but was also one for the enforcement of a lien.

Janki Prasad *v.* Baldeo Narain distinguished by STUART, C. J.

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Per SPANKIE, J., and STRAIGHT, J.—That such decree was a mere money-decree. *Muluq Fuqeer Buksh v. Lala Manohur Doss and Thamman Singh v. Ganga Ram* followed.

Debi Charan v. Pirbhu Din Ram 238

MONEY-DECREE—*Decree enforcing Hypothecation—Mortgage.*] A suit on a bond in which immoveable property was hypothecated was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs, with interest, "in accordance with" such agreement. *Held* (TURNER, J., and OLDFIELD, J., dissenting) that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.

Janki Prasad v. Baldeo Narain 216

Decree enforcing hypothecation of immoveable property—Construction of decree.] A decree was signed by the Court which made it in two places, at the top of the first page and at the bottom of the third page. The second signature followed these words: "Ordered that a decree be given for the plaintiff for the full amount claimed, being principal together with costs and interest at 6 per cent. per annum." The fourth page contained the following order: "The claim for Rs. 10,614 11-0 be decreed by enforcement of hypothecation and auction-sale of taluqa M: it is further decreed that the defendants do pay the plaintiffs Rs. 1,002-0-6 costs of the suit." *Per* OLDFIELD, J. (STUART, C.J., dissenting), on the construction of such decree, that the order contained in the fourth page was part of such decree, notwithstanding that such page did not bear the Court's signature, as the Court's signature at the top of the page covered the whole document, and such decree was not a mere money-decree, but one enforcing the hypothecation of immoveable property.

Per STUART, C.J.,—That, construing such decree with reference to the plaint and judgment in the suit in which it was made, and not with reference to the Court's signatures, such decree was not a mere money-decree, but one enforcing the hypothecation of immoveable property.

Ram Prasad Ram v. Raghunandan Ram 239

See sale in execution of decree 647

MORTGAGE—*Agreement to convey the mortgaged property in case of default—Suit for specific performance of contract—First and Second mortgages—Act I of 1877 (Specific Relief Act), s. 27 (b).*] On the 7th February 1873, *F* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August 1877, he mortgaged such estate to *P*, agreeing that, if he failed to pay the mortgaged-money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." On the 6th October 1877, *F* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February 1873 was extinguished. In December 1877 *B* and *D* obtained a decree against *F* on the mortgage of the 6th October 1877, and in June 1878, in execution of that decree such estate was put up for sale and was purchased by *D*. In February 1880, *P* sued *F* and *D* for the execution of a conveyance of such estate to him in accordance with *F*'s agreement of the 7th August 1877.

Held that the mortgage of the 7th August 1877 was not in the nature of a mortgage by a conditional sale, and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that *D* had no notice of the agreement

of the 7th August 1877, it was very doubtful whether under s. 27 (b) of Act I of 1877 *D* could claim that specific performance of that agreement should not be granted, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien.

Badri Prasad v. Daulat Ram

705

MORTGAGE—Conditional Sale—Pre-emption—Wajib-ul-arz—Cause of action—Compound interest.] On the 12th May 1871, *B* mortgaged, by way of conditional sale, a share of a village to *A*, a stranger. Such mortgage having been foreclosed, *A* sued *B* for possession of such share, and obtained a decree on the 16th April 1878, in execution of which he obtained possession of such share on the 9th September 1878. On the 1st September 1879, *S*, a co-sharer, sued *A* and *B* to enforce his right of pre-emption in respect of such share, founding his suit upon the following clause in the administration-paper of the village: When a share-holder desires to transfer his share, a near relative shall have the first right; next the share-holders of the other pattis; if all these refuse to take, the vendor shall have power to sell and mortgage, etc., to whomsoever he likes."

Held (PEARSON, J., dissenting), having regard to the terms of the administration-paper, that a cause of action accrued to *S* when such mortgage was foreclosed.

Per SPANKIE, J., OLDFIELD, J., and STRAIGHT, J. (STUART, C.J., dissenting) that a cause of action also accrued to *S* when such share was mortgaged by way of conditional sale to *A*.

B stipulated in the instrument of mortgage to pay the interest annually, and in case of default to pay compound interest.

Held, per STUART, C.J., SPANKIE, J., and STRAIGHT, J., that, inasmuch as *B* would have been obliged to pay compound interest had he desired to redeem the mortgaged property, *A* was entitled to receive from *S* compound interest up to the date of foreclosure.

Alu Prasad v. Sukhan

610

First and second mortgagees—Purchase of mortgaged property by mortgagee.] *G*, the mortgagee of certain property, having purchased a portion thereof, sued (i) the mortgagor, (ii) *P*, to whom another portion of such property had been mortgaged before such property had been mortgaged to *G*, and who had purchased such portion subsequently to the mortgage of such property to *G* and *G*'s purchase, and, (iii) *M*, who had purchased a third portion of such property subsequently to *G*'s purchase, for the enforcement of his lien on such property.

Held by STUART, C.J., OLDFIELD, J., and STRAIGHT, J. (PEARSON, J., dissenting) that, inasmuch as it was the manifest intention of *P* to keep his incumbrance alive, and for his benefit to do so, *P*'s purchase did not extinguish his incumbrance, and he was entitled, as prior incumbrancer, to resist *G*'s claim to bring to sale the portion of the mortgaged property purchased by him.

Held also by OLDFIELD, J., and STRAIGHT, J. (PEARSON, J., dissenting) that *G*, notwithstanding he had purchased a portion of the mortgaged property, might throw the whole burden of his mortgage-debt on the portions of the mortgaged property in the mortgagor's possession and in *M*'s possession, but he could not have thrown it on the portion of such property in *P*'s possession.

Gaya Prasad v. Salik Prasad }

Gaya Prasad v. Gaya Prasad }

682

Foreclosure—Demand for payment of mortgage-debt—Power of a minor to take a mortgage—Regulation XVII of 1806, s. 8.] A conditional mortgagee applied for foreclosure, omitting previously to demand from the mortgagor payment of the mortgage-debt. On

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foreclosure of the mortgage, he sued for possession of the mortgaged property. The lower appellate Court dismissed the suit on the ground that the foreclosure proceedings were invalid and ineffective by reason of such omission, and in so doing directed that the demand which the mortgagee should make prior to a fresh application for foreclosure should be limited to a certain amount. *Held* that the foreclosure proceedings were invalid and ineffective by reason of such omission and the suit had been properly dismissed; and that it was not competent for the lower appellate Court to put any limitation on the amount to be demanded by the mortgagee prior to a fresh application for foreclosure.

Observations by STUART, C.J., on the competency of a minor to take a mortgage.

Behari Lal v. Beni Lal

408

MORTGAGE—Foreclosure—Notice—“Legal Representative” of Mortgagor—Regulation XVII of 1806, s. 8.] The holder of a decree for money does not, merely because he has attached land belonging to his judgment-debtor while it is subject to a conditional mortgage, become the “legal representative” of the mortgagor within the meaning of s. 8 of Regulation XVII of 1806, and entitled to notice of the foreclosure of such mortgage; neither is the holder of a prior lien on land which is conditionally mortgaged the “legal representative” of the mortgagor and entitled to notice of foreclosure proceedings.

Radhey Tewari v. Bujha Miar

418

Vendor and Purchaser—Sale—Redemption—Condition against alienation.] The co-sharers of a certain estate sold it to *B*. On the same day as the vendors executed the conveyance of such estate to *B* the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled: provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property and not otherwise. The heir of one of the vendors sold his share of such estate to *A*, and *A* sued *B* to redeem such share.

Held by the Full Bench (STUART, C.J., doubting) that the nature of the transaction between *B* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title.

Held also by PEARSON, J., that the agreement was not of the nature of a personal contract enforceable only by the original vendors and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *B* could not, as implied by the Full Bench ruling in *Dookchore Rai v. Hidayat-ullah* treat as a nullity the sale which had been made to *A* and *A*'s right to redeem could not be reasonably denied and resisted; and that a transfer was not positively but only implicitly prohibited by the agreement, *B* merely declaring that he would not recognize the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect.

Ram Saran Lal v. Amirta Kuar

366

Lambardar and Co-sharers.] The lambardars of a mahal, in order to pay revenue due by them and the other co-sharers of the mahal, transferred the mahal by conditional sale for a term of years' possession of the mahal being delivered to the conditional vendee. The mortgage-debt not having been paid within such term, the conditional vendee applied, as against the lambardars, for foreclosure, and

the mortgage having been foreclosed, sued all the co-sharers, including the lambardars, for possession of the mahal, alleging that the lambardars had acted in the matter of the conditional sale, not only for themselves, but as agents of the other co-sharers. *Held* that, inasmuch as the other co-sharers had not either expressly or by implication authorised the lambardars to enter into the particular contract represented by the conditional sale, and as they had not ratified such contract, they were not bound by the conditional sale and foreclosure.

Bhajan Lal v. Moti 177

MORTGAGE—See Act VIII of 1871, s. 17, ci. (2) 157

Act III of 1877, ss. 17, 49 422

Act X of 1877, s. 43 357

See Act X of 1877, s. 44 660

Jurisdiction 144

Pre-emption 610, 770

Regulation XVII of 1806 509, 653

Hindu Law

Act XL of 1858, s. 18 352

Sale in execution 647

MOSQUE—See Act X of 1877, ss. 520, 21 636

MUHAMMADAN LAW—*Construction of instrument of gift.*] One of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one-fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her; by another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows:—"I declare and record that the aforesaid sister-in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue."

Held that these words did not cut down previous words of gift to what in the Muhammadan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the lands revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil-ewas*, or gift for consideration, granting the villages absolutely.

Muhammad Faiz Ahmad Khan v. Ghulam Ahmad Khan 490

Gift—"Marz-ul-maut."] According to Muhammadan law a gift by a sick person is not invalid if at the time of such gift his sickness is of long continuance, i.e., has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi v. Bibbun Bibi* followed.

Held therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Muhammadan law.

Muhammad Gulshere Khan v. Mariam Begam 731

Presumption as to legitimacy of son—Custom of primogeniture.] Observations on the law laid down by the Privy Council regarding the presumption of legitimacy which arises, under the Muhammadan law, in the absence of proof of marriage, when a son has been uniformly treated by his father and all the members of the family as legitimate.

Also on the law laid down by the Privy Council regarding the custom of primogeniture and the exclusion of females and other heirs from inheritance.

Muhammad Ismail Khan v. Fidayat-un-nissa	723
MULTIFARIOUS SUIT. See Act VII of 1870, ss. 7, 8, 17 sch. i., No. 1	108
See Act VII of 1870, s. 7, cl. 1, and s. 17	131
MURDER. See Act XLV of 1860, ss. 299, 300, 302, 304A., 325	776
See Act XLV of 1860, s. 302	383
Right of private defence	325
NEGLECT TO AID A PUBLIC SERVANT. See Act XLV of 1860,	
ss. 187, 188	201
NON-APPEARANCE OF PLAINTIFF. See Act X of 1877, ss. 102,	
103, 540	292
NOTE OF AGREEMENT IN ACCOUNT-BOOK. See Act I of 1872,	
s. 91	717
NOTE OR MEMORANDUM ACKNOWLEDGING DEBT. See Act	
XVIII of 1869, s. 3 (25), sch. ii., No. 5	581
NOTICE OF FORECLOSURE. See Mortgage	413
OF APPLICATION FOR EXECUTION. See Act X of 1877,	
ss. 248, 311	424
OF SUIT. See Act X of 1877, ss. 2, 424	20
TO CREDITORS TO REGISTER CLAIMS. See Act X of	
1877, ss. 28, 31	799
OBSCKNE BOOK. See Act XLV of 1860, s. 293	837
PARTITION. See Act XIX of 1873, ss. 108, 113, 114	400
Hindu Law	88, 188
Jurisdiction	818
PAST COHABITATION. See Act IX of 1872, ss. 2 (d), 25 (2)	787
PAYMENT OF DECREE BY INSTALMENTS. See Act X of 1877,	
ss. 210, 253	809
PENALTY. See Act XVIII of 1869, s. 3 (5), (25), and sch. ii., No. 11	260
See Bond	440
PLACE OF INQUIRY OR TRIAL. See Act X of 1872, ss. 33, 63	253
See Discharge	251
PLEA TAKEN FOR THE FIRST TIME AT THE HEARING OF	
SECOND APPEAL. See Act X of 1877, s. 373	528
PRE-EMPTION— <i>Allegation by plaintiff that a certain sum is the actual price—Omission to allege readiness and willingness to pay actual price—Discretionary power of Court to grant decree.</i> The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found that the plaintiff had such right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff the lower appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. Held, that it was not necessary to interfere with the exercise of the lower appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of second appeal. <i>Durga Prosad v. Nawazish Ali</i> distinguished.	
Naubat Singh v. Kishan Singh	753
Conditional decree—Act X of 1877 (Civil Procedure Code),	
s. 214— <i>Computation of period specified for payment of purchase-money—Holiday.</i> The decree in a suit to enforce a right of pre-emption, dated the 12th December 1879, declared that the plaintiff should obtain possession of the property on payment of the purchase-money "within thirty days," but that if such money was not so paid, the suit should stand dismissed. The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed,	

expired on the 11th January following. That day was a Sunday: the plaintiff paid the purchase-money into Court on the next day, the 12th January, *held* that, inasmuch as the day on which the decree was made should not be taken into account in computing the period specified in the decree for the payment of the purchase-money, nor the last day of that period, that day being a Sunday, the plaintiff had complied with the condition imposed on him by the decree.

Semble that if the plaintiff had actually failed to deposit the purchase-money within thirty days as directed by the decree, his suit would have been liable to be dismissed, as he could not have claimed to have such period computed from the date the decree became final.

Dabi Din Rai v. Muhammad Ali 850
PRE-EMPTION—Mortgage—Conditional sale—Cause of action.] The cause of action of a person claiming a right of pre-emption in respect of a mortgage by way of conditional sale arises on foreclosure of such mortgage, that is to say, on the expiration of the year of grace without payment by the mortgagor of the mortgage-money, inasmuch as on the expiration of such period the mortgagee acquires a proprietary title to the mortgaged property. Such person can therefore sue to enforce his right of pre-emption on the expiration of such period, and need not wait to do so until the mortgagee has obtained proprietary possession of the mortgaged property.

Hazari Ram v. Shankar Dial 770

Conditional Sale—Act XV of 1877 (Limitation Act), sch. ii, art. 10.] Where a share-holder, if he desires to transfer his share, is bound to offer the transfer of it to his co-sharers before transferring it to a stranger, the right of pre-emption, in the case of a conditional sale, under which possession is not transferred, arises, not when such sale is made, but when the conditional sale becomes absolute.

Under art. 10, sch. ii of Act XV of 1877, the period of limitation runs from the date physical possession is taken of the whole of the property sold.

Jaikaran Rai v. Ganga Dhari Rai 175

Execution of conditional decree.] The decree of the original Court in a suit to enforce a right of pre-emption, dated the 18th February 1879, directed that, on the deposit of the purchase-money within one month of the date on which the decree became final, the decree-holder (plaintiff) should obtain possession of the property in suit, and that, if the decree-holder failed to make such deposit within such period, the decree should become null and void. The vendee (defendant) preferred an appeal from this decree, which the appellate Court, on the vendee's application, struck off on the 18th September 1879. *Held* that, assuming that the order of the appellate Court, by reason that it did not award costs to the decree-holder (respondent), might have been made the subject of a second appeal to the High Court, inasmuch as the decree of the 18th February 1879 could not have been affected by the result of such an appeal, that decree became final on the 18th September 1879, when the appeal from it was withdrawn and struck off, and not on the expiry of one month and ninety days from the date of the appellate Court's order of the 18th September 1879.

Narain Das v. Lachman Singh 135

Rights of pre-emptor—Sale-contract—Purchase-money.] A pre-emptor is entitled to all the benefit which the vendee takes under the contract of sale. *Held*, therefore, where a certain sum was fixed as the price of the property, and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor, as part of the sale-contract, that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale, and the vendee recovered such

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moneys, that the pre-emptor was entitled to a deduction of the amount of such moneys from the sum originally fixed as the price of the property.

Tajammul Husain v. Uda

668

PRE-EMPTION—Minor—Guardian.] The circumstance that a co-sharer of a village was a minor at the time of the preparation of the *wajib-ul-arz*, and that document was not attested on his behalf by a guardian or duly authorized representative is not a reason for excluding him from the benefit of the provisions of that document relating to pre-emption.

• The guardian of a minor is competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and the minor is bound by his guardian's act if done in good faith and in his interest

Lal Bahadur Singh v. Durga Singh

437

Refusal to purchase.] A person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith.

Lajja Prasad v. Debi Prasad

236

See Act X of 1877, s. 310

16, 827

PREVIOUS CONVICTION. See Act XLV of 1860, ss. 75, 457, 511

778

PRINCIPAL AND SURETY. See Act IX of 1872, s. 133

9

PRIVILEGED COMMUNICATION. See Defamation

815

PROFITS—Lambardar and co-sharer.] The lambardar of one patti of a mahal, who was a shareholder of both pattis of the mahal, sued the lambardar of the other patti and a shareholder of such patti for profits divisible among the shareholders of the mahal generally, deducting the share of such profits belonging to the defendants. *Held* that, as the suit was one for settlement of accounts between the body of shareholders in which it was necessary that all of them should be properly represented, and as the plaintiff was suing without their authority, the suit was not maintainable.

Udai Ram v. Ghulam Husain

186

PROMISSORY NOTE. See Act XVIII of 1869, s. 3 (5), (25), and sch. ii, No. 11

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See Act XVIII of 1869, s. 3 (25), sch. ii, No. 5

581

See Act XVIII of 1869, ss. 39, 40

116

See Act I of 1872, s. 91

717

PUBLICATION. See Act XLV of 1860, s. 499

664

PURCHASE-MONEY. See Pre-emption

664

QUESTIONS FOR COURT EXECUTING DECREE. See Act X of 1877, ss. 244, 258

533, 538

RATIFICATION BY MINOR. See Act XL of 1858, s. 18

852

RECEIVING STOLEN PROPERTY. See Act XLV of 1860, ss. 379, 411

181

REGISTRATION. See Act VIII of 1871, Act III of 1877, Act XV of 1877, s. 19 and sch. ii, Nos. 57, 85.

REGULATION XVII of 1806. See High Court, powers of revision

576

s. 7—*Conditional sale—Interest—Mesne profits—Foreclosure.]* A deed of conditional sale, after reciting that the vendor had received the sale-consideration (Rs. 199) and had put the vendee in such possession of the property as the vendor himself had, proceeded as follows :—" I (vendor) shall not claim mesne profits, nor shall the vendee claim interest : in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession : and when after the expiry of the term fixed, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed : in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute." The vendee did not get possession of the property for some years, and, on the expiry of the term, took proceedings under Regulation XVII of 1806 to foreclose. The legal representative of the vendor deposited the

sale-consideration mentioned in the deed of conditional sale (Rs. 199) within the year of grace. In a suit by the vendee for possession of the property, the sale having been declared absolute, the question arose whether or not the legal representative of the vendor should have deposited, by way of interest, in order to prevent the sale from becoming absolute, in addition to the sale-consideration, the amount of mesne profits for period the vendee was out of possession of the property. *Held* (SPARKIN, J., dissenting), on the construction of the deed of conditional sale, that the deposit of the sale-consideration (Rs. 199) was sufficient for the redemption of the property.

Rameshar Singh v. Kanhia Sahu

653

REGULATION XVII of 1806, s. 8—*Conditional sale—Foreclosure of mortgage.*] An instrument of conditional sale provided that the conditional vendor should retain possession of the property to which it related, paying interest on the principal sum lent annually at twelve per cent., and should repay the principal sum lent within seven years; that (by the fourth clause thereof in the event of default of payment of interest in any year, the term of seven years should be cancelled, and the conditional sale should at once become absolute; and that (by the fifth clause thereof) in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held* that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of s. 8 of Regulation XVII of 1806, and was compatible with them, and on or after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed; and that accordingly such suit was not maintainable.

Imdad Husain v. Mannu Lal

509

REGULATION VII of 1822. *See* Hindu Law

738

RE-MARRIAGE OF HINDU WIDOW. *See* Act XV of 1877, sch. ii, Nos. 115, 120

395

REMAND. *See* Act X of 1877, ss. 584, 586, 588(28), 589; Act X. of 1877, ss. 57 (a), 562, 588

855

RES JUDICATA.—*Determination of Title by Revenue Court—Estoppel—Act IX of 1871 (Limitation Act), s. 29, and sch. ii, arts. 14, 15, 118, 145—Limitation—Suit for possession of immoveable property—Suit for a declaration of proprietary right.*] In 1864 the defendants served a notice upon the plaintiff demanding rent for land in his possession for which the plaintiff had not paid them rent previously. The plaintiff thereupon instituted a suit in the Revenue Court, contesting his liability to pay rent for such land on the ground that he was the proprietor thereof. A decree was made in that suit on the 16th August 1865, directing the plaintiff to execute a *kabuliyat* to pay the defendants rent for such land at a certain rate. The plaintiff did not appeal from that decree, but from its date until August 1877, paid the defendants rent for such land. On the 8th August 1877, the plaintiff instituted the present suit against

the defendants in the Civil Court in which he claimed a declaration of his proprietary right to such land, and to be maintained in possession thereof as proprietor, free from the liability to pay rent, and to have the decree of the Revenue Court, dated the 16th August 1864, declared null and inoperative. *Held* that the plaintiff's suit in the Revenue Court not being one which that Court was competent to entertain, the decision in that suit could not be held final on the question of title raised in the present suit; that there was nothing in the conduct of the plaintiff which estopped him from instituting the present suit; that the limitation applicable to the present suit was not that provided by art. 118 of sch. ii. of Act IX of 1871, but that provided by art. 145 of that schedule, a suit by a person in the possession of land for a declaration of proprietary right being substantially a suit for possession of immoveable property, and the present suit was therefore within time; and that arts. 14 and 15 of that schedule were not applicable, there being no decree or order which the plaintiff was bound to have set aside within one year.

Debi Prasad v. Jafar Ali 40
RES JUDICATA. *Execution of Decree.*] On an application being made for the execution of a decree, the judgment-debtor made three objections to its execution. The first of these objections the Court executing the decree, the Subordinate Judge, allowed, and refused to execute the decree. On appeal by the decree-holder, the District Judge disallowed all three such objections, holding that the decree should be executed; and remanded the case for that purpose. When the case came back to the Subordinate Judge, the judgment-debtor again raised the second and third of such objections, but the Subordinate Judge refused to entertain them on the ground that they had already been determined by such District Judge. On appeal by the judgment-debtor the successor of such District Judge ordered the Subordinate Judge to determine all three such objections. *Held*, that such succeeding Judge could not reopen such questions, his predecessor having already finally determined them, and his predecessor's order, so far as such application for execution of the decree was concerned, was final.

Ballabh Shankar v. Narain Singh 173

— See Act X of 1877, s. 13 51, 141, 189, 297, 334, 812

— See Act X of 1877, chap. xli, xlii, s. 577 152

— See Jurisdiction 81, 85, 521

REVERSIONER.—See Act XIX of 1873, ss. 108, 113, 114 400

— Hindu Law 362

RIGHT OF PRIVATE DEFENCE—Murder.] A head-constable, making an investigation into a case of house-breaking and theft, searched the tents of certain gipsies for the stolen property, but discovered nothing. After he had completed the search, the gipsies gave him a certain sum of money, which he accepted, but at the same time, not deeming it sufficient, he demanded a further sum from them. They refused to give anything more on the ground that they were poor and had no more to give. Thereupon he unlawfully ordered one of them to be bound and taken away. On his subordinates proceeding to execute such order, all the gipsies in the camp, men, women, and children, turned out, some four of five of the men being armed with sticks and stones, and advanced in a threatening manner towards the place such gipsy was being bound and the head-constable was standing. Before any actual violence was used by the crowd of advancing gipsies the head-constable fired with a gun at such crowd, when it was about five paces from him, and killed one of the gipsies, and, having done so, ran away. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased had he released the gipsy he had unlawfully arrested and withdrawn himself and his subordinates, or had he effected his escape. *Held*, that such head-constable had not

a right of private defence against the acts of such gipsies, as those acts did not reasonably cause the apprehension that death or grievous hurt would be their consequence, and such head-constable was guilty of culpable homicide amounting to murder.

Empress of India v. Abdul Hakim	263
RIGHT TO BEGIN. See Act X of 1877, s. 578	824
SALE IN EXECUTION OF DECREE— <i>Money-decree—Decree enforcing hypothecation—Act X of 1877 (Civil) Procedure Code</i> , ss. 287, 316— <i>Act VIII of 1859, (Civil Procedure Code)</i> , ss. 249, 259.] Certain immoveable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money, and was purchased by C, with notice that L held a decree enforcing a lien on such property. Subsequently L applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by S. S sued, by virtue of such purchase, to recover possession of such property from C. Held that, inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property, and as C had purchased the property in suit with notice of the existing lien on it, and subject to its re-sale in execution of the decree in execution of which S had purchased it, what actually was sold in execution of that decree to S was such property, and S was entitled to possession of such property under such sale.	
Sales under Act VIII of 1859 and Act X of 1877 distinguished.	
Sheo Ratan Lal v. Chotey Lal	647
SALE IN EXECUTION. See Act VIII of 1859, s. 13	568
Act VIII of 1859, ss. 222, 256, 257	701
256, 257	112, 206
Act X of 1877, ss. 248, 311	424
ss. 286, 311 312	366
s. 295	579, 770
s. 310	15, 674, 827
s. 311	333
ss. 311, 312, 588	554
s. 313	527
s. 365, 366	759
See Hindu law.	
See Haq-i-chaharam	797
SANCTION FOR PROSECUTION. See High Court, powers of revision	509
SECOND APPEAL. See Act X of 1877, ss. 57 (a), 582, 588	355
Act X of 1877, ss. 540, 588 (6)	546
ss. 556, 558	519
ss. 584, 586, 588 (28), 589	18
SECURITY. See Act XXVII of 1860, ss. 6, 6	304
BOND FOR DUE ACCOUNTING FOR PROPERTY RECEIVED BY VIRTUE OF OFFICE. See Act I of 1879, sch. ii., No. 12 (b)	788
TO KEEP THE PEACE. See High Court, powers of revision	545
SEB. See Act X of 1871	404
SEPARATE SUIT. See Act X of 1877, ss. 244, 258	533, 538
SOLDIER. See Act III of 1880, s. 14	214
SPECIFIC PERFORMANCE OF CONTRACT. See Act X of 1877, ss. 43, 44, Mortgage	680, 706
STATION. See Act XIII of 1859	744
SUB-CONDUCTOR. See Act III of 1880, s. 14	214
SUIT COGNIZABLE IN SMALL CAUSE COURTS. See Act XI of 1865, s. 6	163, 747
See Act X of 1877, ss. 584, 586, 588 (28), 589	18

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SUIT COGNIZABLE IN SMALL CAUSE COURTS. *See* Act X of 1877,
s. 586

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See Jurisdiction 37, 66

SUIT TO ESTABLISH RIGHT—*Attachment in execution of decree.*—*B* caused certain immoveable property to be attached in the execution of a decree *M* objected to the attachment, claiming to be in possession of such property on his own account. The investigation of such claim, which followed under s. 246 of Act VIII of 1859, took place as between *B*, the decree-holder, and *M*, *N*, the judgment-debtor, not being a party to it except in name. *M*'s objection was allowed in May 1871, but no suit was brought either by *B* or *N* to establish *N*'s right to such property. *H* subsequently obtained a decree against *N* in 1877, and in execution thereof caused such property to be attached. *M* objected to the attachment and his objection was allowed in April 1878. In March 1879, *H* sued *M* for a declaration that a moiety of such property belonged to *N* and to have the order removing the attachment cancelled. *Held* that *N*'s right to a moiety of such property was not extinguished because he had not sued to establish it within one year of the making of the order of May 1871, in the execution-proceedings of *B*, and *H* was competent to sue to establish such right.

Mannu Lal v. Harsukh Das 239

TREES—*See* landholder and tenant 43

TRUST—*Absent co-sharer—Wajib-ul-arz.*—*S* and his brother owned an eight-anna share of a village, and *H* and *D* owned the other eight annas share, the parties being related to each other by blood. In 1866 (Sambat 1921), at the settlement of the village, the following statement was recorded by the settlement officer in the *wajib-ul-arz* at the instance of *H* and *D*, with whom the settlement was made, *S* and his brother being absent from the village and having been absent for some ten years:—"We, *H* and *D*, are equal sharers of one eight annas and *S* (and his brother) of the other eight annas in the village according to descent: ten years ago *S* (and his brother) went away into Orai; their present residence is not known: they have not left woman, child, or heir of any kind in the village: on that account the entire sixteen annas of the village are in possession of us, *H* and *D*: at the time of the preparation of the *khewat* we made a gift of four annas of our own eight annas to *P* and have given him possession of four annas of the eight annas belonging to *S* and (his brother), keeping the remaining four annas in our own possession: when *S* and (his brother) return to the village, we three who are in possession shall give up the eight annas share of the aforesaid persons." In March 1880 *S* sued *P* for possession of the four annas mentioned in the *wajib-ul-arz* as having been made over to him by *H* and *D* out of the eight annas share belonging to *S* and his brother. He based his suit upon the *wajib-ul-arz*, but did not expressly state that the share in suit had been intrusted to *H* and *D* on the understanding that it should be returned to him when he reclaimed it. The lower appellate Court dismissed the suit as barred by limitation on the ground that *P*'s possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when *S*, having returned to the village, had claimed the share and *P* had refused to surrender it. On second appeal it was contended by *S* that under the terms of the *wajib-ul-arz* *P*'s possession was that of a trustee and his possession could not be held to be adverse.

Per SPANKIE, J.—That, inasmuch as there was no direct evidence that the share in suit had been intrusted by *S* to *H* and *D* on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the *wajib-ul-arz*, which amounted to nothing more than an acknowledgment of *S*'s title and an offer to surrender possession when he returned, and as when he

did return in 1866 or 1867 *P* refused to surrender possession, *S* was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation.

Per Pearson, J.—That although no mention was made in the *wajib-ul-arz* of such a trust as was contended for, yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the *wajib-ul-arz* and to the fact that *S* and his brother were not strangers to *H* and *D*, nor merely co-sharers, but near blood relations, probably residing together on the same premises and partners in agricultural labors, further inquiry should be made with the view of elucidating the nature of the acquisition of *H* and *D* of the share and of their subsequent possession.

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